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REPORT

ON THE

INDIAN PENAL CODE.

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CALCUTTA:
W. RIDSDALE, MILITARY ORPHAN PRESS.
1846.

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FROM THE INDIAN LAW COMMISSIONERS,

TO THE HONORABLE

THE PRESIDENT OF THE COUNCIL OF INDIA,
IN COUNCIL.

DATED THE 23D JULY, 1846.

1. We have the honor to submit a Report on the Indian Penal Code, in pursuance of the instructions communicated to us in Mr. Secretary Bushby's letter, dated the 26th April 1845, as follows :—" The " Governor General in Council is desirous that some step should be " taken towards a revision of the Code* with a view to its adoption with " such amendments as may be found necessary, or to its final disposal " otherwise. For this purpose I have been instructed to refer to you " for examination, all the opinions received from the several Presiden- " cies as per enclosed list, and to direct your attention to the 'Act of ' Crimes and Punishments' contained in the Seventh Report of the Com- ' missioners on the Criminal Law of England, with a view to compa- ' rison, and the detection of any omissions or other imperfections that ' may exist in the Code. With these materials, the Governor General ' in Council trusts that you will be enabled to frame such a report as ' may assist the Government of India in forming a judgment on the ' merits of the Code at no distant date."

Received 13th May 1845.

* The printed Draft of a Penal Code prepared by the Indian Law Commissioners, and submitted to the Government of India under date the 14th October 1837.

2. We have with great pains and care examined, compared and ligested, the voluminous papers containing commentaries and strictures n the Penal Code transmitted to us with Mr. Bushby's letter, and aving reviewed the Code generally with reference thereto, we have dicted our more particular attention to the Chapters of the greatest imortance, namely, those treating " of offences affecting the human body," Ch. XVIII. nd " of offences against property," Ch. XIX. and to those of a general nature overning the whole, namely, the Chapter of " General Explanations," Ch. I. ie Chapter of " General Exceptions," Chs. III. IV. and the Chapter of " Abetment."

3. Having studied the definitions of crimes and the rules and enal provisions contained in those chapters, with the aid of the lucid and ble expositions of the principles upon which they are framed which are forded in the valuable notes appended to the Code, we turned to the istructive reports of the Commissioners on the English Criminal Law, id to the Digest of crimes and punishments contained in their Seventh

Report, and carefully compared the two systems, with reference occasionally to the Code Penal of France and Mr. Livingstone's Code for Louisiana, and with a constant regard to the Laws actually administered by the Company's Courts under the several Presidencies. Thus prepared, we proceeded to revise the Chapters, taking Clause by Clause, and considering particularly the criticisms, objections, or suggested amendments, which we had previously noted as worthy of remark.

4. Our work performed in this manner has necessarily occupied a great deal of time, and the observations we have thought it proper to offer have extended to a greater length than we anticipated.

5. The following Report is a Record of those observations, prefaced by a general notice of the papers referred to us for examination, and some observations suggested by criticisms of a general nature contained therein. We submit it as affording a sample* from which your Honor in Council will be able to form a pretty fair judgment of the value of the whole Code.

* The whole Code consists of 488 Clauses, of which 233 Clauses are comprised in the Chapters reviewed in this Report

REPORT.

Her Majesty's Supreme Courts—Judges and Law Officers

6. The papers transmitted with Mr. Bushby's letter comprised Reports from the following Judges of Her Majesty's Supreme Courts:—

Calcutta, ...	The Hon'ble	Sir J. P. Grant, *Puisne Judge.*
	„	Sir H W. Seton, *Puisne Judge.*
Madras, ...	„	Sir R. B. Comyn, *Chief Justice.*
	„	Sir E. J Gambier, *Puisne Judge, now Chief Justice.*
Bombay, ...	„	Sir H. Compton, *Chief Justice.*
	„	Sir J Awdry, *Puisne Judge, afterwards Chief Justice,*

a Report from the Advocate General at Madras, Mr. G. Norton, and one from the Company's Standing Counsel at Calcutta, Mr. J. Cochrane.

Hon'ble Company's Courts. Judges of the Sudder Courts and Subordinate Judges and Magistrates, &c.

Also a Report from the Sudder Court for the North-Western Provinces under the Presidency of Fort William in Bengal, and separate Reports from two* of the Judges of the Sudder Court at Madras, and three† of the Judges of the Sudder Court at Bombay, accompanied by Reports from the Judges, Magistrates, &c., subordinate to the said Courts respectively, and a separate Report from Colonel Sleeman, Commissioner for the Suppression of Thuggee

* Mr W Hudleston and Mr A D Campbell
† Mr Gibernt, Mr Pyne, and Mr Greenhill.

7. Of the Judges of Her Majesty's Courts whose reports are above-mentioned, Sir J. P. Grant, Sir E. J. Gambier, and Sir H. Compton have not entered into a particular examination of the Code.

8. Sir J. P. Grant states that he considers it incompatible with his duties as a Judge to undertake the task of reviewing the Code and giving his opinion upon it, concluding with the following words, "I confess that I cannot set a limit to the number of years which it "would be necessary for me to devote exclusively to the consideration "and study of such a Code, and of all the large and intricate and appall-"ing questions with which it must be of necessity surrounded, if I could "think it consistent with my judicial duties, and the measure of my "learning and capacity, to undertake so vast a task in so untried a path "of speculative jurisprudence and legislation."

9. Sir E. J. Gambier says, "I have always entertained the strong-"est doubts of the propriety or expediency of promulgating any Code "of Law which professes to be more than a compilation and a better "arrangement of those enactments which have previously been in force, "and which former experience has sanctioned and approved; and I have "always thought that such a body of law should be modified by those "additions and alterations alone of which the same experience has "evinced the utility or the need. To do more than this, to put forth a "body of law which is not even founded upon any previously existing "system, and to clothe the enactments in language which is as new to "those who are to dispense the law as to those who are to live under it, "appears to me a mode of proceeding irreconcilable with the maxims of "practical wisdom, and one calculated to introduce a degree of confu-"sion and difficulty which has never yet been found in administering the "criminal justice of any civilized country."

"Such (he adds) being my general opinion on the Code in question, "I do not enter into the consideration of the different parts of it."

10. Sir H. Compton professes not to attempt a criticism of the work of the Law Commissioners, or of its arrangement, or particular provisions, but to state the grounds upon which *a priori* he is of opinion that the Code they have prepared should not be adopted. In the first part of his elaborate paper he endeavors to shew, that in preparing the Penal Code in the manner in which it has been prepared, as a general system of Criminal Law for India to be substituted for all the systems which now prevail, the Law Commissioners have done what was not

intended by Parliament, while they have omitted to do "what was contemplated and commanded by Parliament," and that if in taking this course they were guided by instructions from the Governor General in Council, such instructions were unwarranted, for "the Governor General "in Council had not legal power to dispense with the directions contain-"ed in the Act of Parliament, which in fact created their own autho-"rity."

11. Passing from this preliminary objection, and, for the purpose of discussion, supposing that all that has been directed by Parliament has been substantially done, and that the Law Commissioners have been instructed to prepare a Code, he proceeds to consider the three following questions:

1st. Whether it is expedient, if practicable, "at once to change "the penal jurisprudence of all British India"?

2d. "Whether it is practicable to form one system of law that "can, or ought to be, applicable to every one in common."?

3d. "Whether the Code which has been proposed is likely to pro-"duce the benefits the Law Commissioners profess to expect from it."?

12. The first question he regards as decided already by Parliament, the language of the Act of Parliament plainly expressing, as he thinks, that "it was not the intention of the legislature, in short that it was not "*expedient* to change the whole penal jurisprudence of British India."

13. On the second question he refers to the experience of similar legislation in other countries, and averring that it has not produced the benefits expected from it "even with people who have long been subject "to the same form of Government, and who profess the same creed, and "that hitherto there has been found an inherent difficulty in framing any "system of written law," he concludes that "it may well be doubted "whether it be *practicable*, if *expedient*, to make penal enactments that "may be equally applicable to every description of person in every part "of British India," and intimates his opinion that "with due research and "enquiry there may be found in the systems of penal law which now "prevail in British India, sufficient and sound materials for making such "alterations and amendments in this branch of jurisprudence as the "present form of Government and the condition of the people may "require."

14. Lastly, with respect to the Code, prepared by the Law Commissioners, or rather (for he professes not to have examined the Code itself) to the description of it contained in their letter to the Governor General in Council with which it is prefaced, and with reference particularly to their reasons for framing "illustrations of their definitions," and to their avowed desire to limit the power which Courts of Justice possess of putting their own sense on the laws, he argues that "similar "attempts to simplify Criminal Codes have utterly failed, and that it is "no longer considered useful to attempt to render them perfect by the "introduction of all possible cases, which after all is deemed an impos-"sibility."

15. He insists on "the importance of procedure," in order "to "shew that until we know what system the Law Commissioners intend "to recommend, we cannot sufficiently examine or estimate the particu-"lar provisions of the Code which has been framed."

16. Of the other Judges above named, the reports of Sir H. Seton and Sir R. Comyn contain comments upon details, as well as general remarks and criticisms upon the plan of the work and the principles laid down in it, and expounded in the Notes. The report of Sir J. Awdry consists of "general observations which respect the character of the whole work," which he intended to follow up with remarks upon the practical details, an intention which it is much to be regretted he did not fulfil.

17. Sir H. Seton speaking of the expediency of framing a Code for this country at the present time, observes that "the best justifica-"tion of it seems to be found in the necessity of some system, the ab-"sence of any satisfactory one, and the hopelessness of constructing a "more perfect one, except by means of successive improvements upon "this," adding that "if the attempt were to be delayed until all the in-"formation which theoretically might be considered desirable were "obtained, it could never be made."

18 Having submitted "a few observations respecting Codes generally," he proceeds to examine the one now under consideration He remarks first the number of new offences created by it, and states his own views as to the desirableness of extending as far as possible the operation of compensation, and limiting that of punishment. These views he observes are not suggested as opposed to those contained in the Code, but he thinks it may fairly be questioned whether they are sufficiently kept in view in the multitude of new offences created by it.

19 He next adverts to the language of the Code, and more especially to the definitions of crimes contained in it. He observes that Criminal Legislation demands plain language and definite precepts, but how far this is supplied by the Code with all the assistance derived from its illustrations, he thinks questionable. He remarks that the object seems to have been to exclude judicial discretion, but that however desirable it may be to limit judicial discretion, it is in vain to attempt wholly to exclude it by definitions however illustrated.

20. He says generally that "the Code itself furnishes abundant "reasons why it should not be put into operation, until the whole system "is completed." This he adds, "will afford the means of extending civil "rights and remedies, and may be found to modify or supersede many of "the present provisions of it."

21 His observations upon the details of the Code are submitted in a separate paper.

22. Of these observations and the criticisms in his report, he says they "are made with freedom, but not in a hostile spirit, not without a "just sense of the great difficulty of the undertaking, of the pains bes-"towed upon the execution of it, and above all of the masterly manner "in which the principles connected with it are discussed and developed "in the notes."

23. Sir R Comyn remarks, that "his own experience has been "almost exclusively confined to the administration of Criminal Law "at the Presidency of Fort Saint George under the English system," and observing of that system that "it is built up on notions not unfrequent-"ly inapplicable to the Native Society of India, and too often clogged by "technical subtleties, which, if intended to protect the innocent, occasi-"onally assist in the escape of the guilty," he says that "he certainly "should be very far from advocating the extension of it beyond the limits "of the several Presidencies, whilst he thinks it highly desirable that, "if the Mofussil is to be governed by regulations emanating from British "Authority, these should be assimilated throughout the territory as far "as the nature of things may permit," therefore "in reviewing the pro-"posed Code, he has endeavored to allow himself to be as little influ-"enced by the prejudices of education and professional habits as could "reasonably be expected, and to consider himself called upon to remark "upon an entirely new compendium of Law by which the persons and "property of those who reside in India, under the British dominion, "may be best protected."

24. He observes that he has found himself embarrassed in adverting to the various provisions of the Code by his ignorance of the manner in which it is proposed to carry them into effect, and expresses an opinion that under the system of criminal pleading now in force at the Presidencies, it would be difficult, if not impossible, to frame the accusations so as to meet many of them, adding that the very introduction of new Terms and new Definitions would be a great impediment.

25. Before adverting to the particular heads of enactment, he "points out two or three imperfections which as a system of Criminal Law "seem to pervade the whole." His remarks refer, 1st, to the system of "Illustrations;" 2dly, to the provisions by which "the commission or non-commission of an offence is made to depend upon what may be passing in the mind of the party offending at the time of committing the act laid to his charge; 3dly, to the provisions "treating acts which are really outrages on society as merely offences to individuals." After commenting on the above heads, he says "these are the chief general "observations which have occurred to me on an attentive perusal of the "text and the accompanying notes—many objections which had suggest-"ed themselves to me in the former have been entirely or in great mea-"sure removed by the satisfactory reasoning of the latter." In reviewing the details he finds occasion for a few brief observations only, upon particular Chapters and Clauses. With regard to the two important Chapters treating of "offences affecting the human body" and of "offen-"ces against property," he says of the former that it contains only one provision which appears to him, objectionable in substance, of the latter that "it strikes him as a very successful digest of Law for the protec-"tion of property."

26. Sir J. Awdry says he conceives that he is not consulted on the expediency or practicability of codification in general, or as regards the Penal Law of India in particular, but that assuming the necessity of framing a penal Code as the only means of providing for the wants of a population which has no system of jurisprudence applicable to all, he is merely consulted as to the execution.

27. The first impression, he says, which was made upon him, by he perusal of an early draft of the Code without the preface or notes, was, how simple and practical the whole scheme seemed to be, how little (with certain grave exceptions) departing from the substantial principles of the Law of England. "This impression," he proceeds to say, "has

" been confirmed by the perusal of the complete work, and to it has been " added a sense of the general comprehension of its plan and of the " sound reason of large classes of its enactments." Again he remarks, " the enactments are generally so conformable to the sound and univer- " sal principles of this branch of Law, which is or ought to be less artifi- " cial than the civil, that I should see no great inconvenience and no in- " justice in its introduction." Contrarily to Sir R. Comyn, he observes that " the procedure of the English Law seems fully adequate to the gene- " ral working of the Code," and that he could " easily leave to the jury " almost any charge it contains."

28. The above he observes, is " almost the highest praise of which " he conceives the draft of such a work capable, as long as it is not " matured by those amendments and interpretations which in the course " of time will supply its defects, correct its errors, and authenticate the " sense of every line. The present involves a bold, and to a certain ex- " tent, a successful attempt to mitigate the unavoidable evils of the sud- " den introduction of a mass of enacted Law."

29. On the whole he says, he " views this work as an admirable " attempt to comprise in a single statute, the definition of Crimes and " their punishments, but no more ; and considers that those who because " they can point out numerous, and important defects in it, think they " shew that it is not entitled to that praise, only betray their own igno- " rance of the extreme difficulty of sound legislation."

30. Mr. Norton, the Advocate General at Madras, in a long report, offers objections to the Code " which not only extend throughout almost " all its details, but also to the legislative principles upon which it is " founded." In the conclusion of his report he says, " my objection to " the Code is to it as a *whole*. I conceive it framed on erroneous prin- " ciples. I deem it constitutionally defective, and that it requires recon- " struction throughout, and to be elaborated upon a different plan and " upon far more extensive data."

31. Mr. Cochrane, the Company's Standing Counsel at Calcutta, confines his observations to the Chapters under the heads of "Punish- "ments," " General Exceptions," " Abetment," " Offences relating to the Army and Navy," and " Offences against Public Tranquillity," in all which he finds provisions that appear to him highly objectionable.

32. The Sudder Court for the North Western Provinces of the Presidency of Fort William, while they express a doubt whether the plan

followed in the preparation of the Code is the best that could have been adopted, yet "willingly recognize its comprehensiveness, and the general "success (as far as can be predicated of any production not submitted "to the test of practice) with which it has been executed." Referring to the opinions given by officers subordinate to the Court submitted with their own report, they observe that one only disapproves of the Code absolutely, and that, the majority "approve of it with qualifications." A general approbation of the Code, we remark, is expressed by a considerable number.

33. Colonel Sleeman, Commissioner for the Suppression of Thuggee, whose opinion was specially called for by Government on account of his great practical experience, says "I have read the Code over several times "very carefully, and can honestly say that at every reading it has grown "more and more upon my esteem. I am persuaded that it might be "put immediately in force with great advantage to the people of India; "and that it would soon become all that could be desired under the "fostering care of the Legislative Council and Law Commission, in the "manner pointed out in the 25 para. of the letter of the Law Commission "to the Governor General of India." Colonel Sleeman suggests certain alterations and additions as likely to be useful. We may note in particular, that he proposes to add Clauses for the punishment of Seduction and Adultery, and making it penal to sell or buy human beings, in order to put an end to Slavery in India.

34. Of the Judges of the Sudder Court at Bombay and of the Officers subordinate to that Court whose opinions are recorded, not one disapproves of the Code absolutely; some express unqualified approbation of it; others express approbation with certain reserves and qualifications; and one or two, apparently approving in general, suggest additions and modifications by which they think it may be amended.

35. Of the two Judges of the Madras Sudder Court whose opinions are recorded,* one expresses unqualified disapprobation generally. The† other disapproves of the Code for the most part, but dissents from the adverse comments of his Colleague in many places, and expresses approbation of particular portions. Of the subordinate Officers, a generally unfavorable opinion of the work is expressed by about a fourth part, and a generally favorable opinion by about one half; of the rest some may be taken as approving on the whole, but objecting to particular portions, and suggesting modifications, others as disapproving on the whole, but expressing approbation of particular portions, and a few as offering particular objections, but not giving a decided opinion on the whole.

* Mr W Hudleston
† Mr A. D. Campbell

36. We would draw attention especially to the able report of Mr. J. F. Thomas, a Judicial Officer of great experience (now Chief Secretary to the Government of Madras) referred to by the Judges of the Madras Sudder Court, as containing many important and judicious observations and suggestions.

37. We shall be found in the sequel to give due consideration to the valuable comments of Mr. Thomas, in reviewing the particular provisions to which they apply. We shall now merely note the general opinion expressed by Mr. Thomas.

"Looking upon the Code as a whole, and as a substitute for the "existing Regulations, I consider it chiefly valuable as a compendium "of the latest, and most enlightened views of penal jurisprudence, ap-"plied with much judgment to the wants, and circumstances of India. "The extensive use of pecuniary penalties, with the important object "of rendering them the means of indemnifying parties injured; the "Chapter on Abetment, and the introduction of the discriminating prin-"ciple of the French Code in cases of Perjury, are a few of the instances "of great and highly valuable improvements to which I allude. There "is also a comprehensiveness in the definitions of Offences which will, I "think, do much to remedy an evil of the present system under which "crimes may either be committed with impunity, or, are only brought "within the jurisdiction of the Courts, under some uncertain provisions of "the Mahomedan Law, (Section VII. Regulation X. 1816) unknown "to the Officers presiding in the Courts, and which ordinarily annex "the arbitrary penalty of Ookoobut, leaving it therefore discretionary "with the Courts to adjudge any, or little, or no punishment. This "evil cannot exist under the new Code; whilst the comprehensiveness "of the definitions will also render the constant interference of the "legislature, and frequent additions to the penal Laws, unnecessary.

"The entire abrogation of the Mahomedan Law, relieving the Cri-"minal Jurisprudence of the country from a barbarous incumbrance, "will also be found a most important improvement, and I consider the "Code on the whole, well calculated to form the basis of a greatly im-"proved system. It is, I am of opinion, capable of being at once made "Law in the Provinces, and substituted, with but little modification, for "the present Regulations of the Government."

38. Having thus briefly indicated the general tenor of the reports upon the Penal Code which have been referred to us for examination,

we shall now notice particularly some of the objections that have been made to the plan of the work, and to the leading principles of the Code.

39. We conceive that we are not required on this occasion to discuss the reasonings which are to be found in several of these reports on the expediency of codification in general, or as regards the Penal Law of India in particular, but that, with Sir J. Awdry, "assuming the necessity of a Penal Code as the only means of providing for the wants of a population which has no one system of jurisprudence applicable to all," and, with Sir H. Seton, deeming that "the best justification of it is to be found in the necessity of some system, and the absence of any satisfactory one," we are to consider, whether the Code which has been proposed is fitted in its principles and its substantive provisions for the purpose which it was designed to serve, and is capable, with or without modification, of being brought into practical operation as a general system—whether it may be advisable for the legislature to adopt it, not as a body of Law already perfect, which its authors never pretended it to be,* but as a systematically digested Statute of Crimes and Punishments based upon sound principles, and defined with a precision before unknown, sufficiently complete to be acted upon, and which when brought into operation may be reasonably expected to work immediately an important improvement in the administration of Criminal Justice, by methodizing it, and rendering it more easy, certain, and equal; looking to its being gradually matured and advanced towards perfection in the manner contemplated by the Commissioners, by which the legislature will be enabled easily to supply the defects, correct the errors, and reconcile the inconsistencies, discovered by experience.

40. In the prefatory letter to the Governor General in Council, the Law Commissioners declare that the system of Penal Law contained in the Code is "not a digest of any existing system," and that no existing system had furnished "even the ground-work" for it. In another place in the same letter, after repeating that they had not thought it desirable, for reasons stated, "to take as the ground-work of the Code any of the systems of Law now in force in any part of India," they say they had however "compared the Code with all those systems and taken suggestions from all, though they had not adopted a single provision merely because it formed a part of any of these systems," adding "we have also compared our work with the most celebrated systems of Western

* NOTE.—They say, "in a work so extensive and complicated as that on which we have been employed, there will inevitably be, in spite of the most anxious care, some omissions, and some inconsistencies" "We have done as much as could reasonably be expected, if we have furnished the Government with that which may by suggestions from experienced and judicious persons be improved into a good Code."

"jurisprudence, as far as the very scanty means of information which "were accessible to us in this country enabled us to do so. We have "derived much valuable assistance from the French Code, and from the "decisions of the French Courts of Justice on questions touching the "construction of that Code. We have derived assistance still more "valuable from the Code of Louisiana, prepared by that eminent jurist, "the late Mr. Livingstone."

41. Upon the ground of the above declaration the Commissioners are severely censured in several of the reports. The course taken by them is denounced as "irreconcileable with the dictates of practical wis-"dom," and as leading almost inevitably to erroneous conclusions. The Code is spoken of slightingly as "an invention" "based upon theoreti-"cal, not practical principles," and this is said to be "a demerit fatal to the "whole work." But while the Commissioners are so much blamed for rejecting all the systems of Law at present in force in India, or, to speak more correctly, for not following any of them implicitly in laying the ground-work of their Code, those who find fault with them in this respect are not at all agreed as to what they ought to have done.

42. The Commissioners came to the determination to frame a new Code upon a plan of their own, because they found, as they thought, not "even the rudiments of a good Code" in any of the three systems contained in the Regulations of Bengal, Madras, and Bombay, and because they deemed the artificial and complicated system of the English Criminal Law which prevails within the local jurisdiction of Her Majesty's Courts to be unsuitable.

43. Now with respect to the former, we find that Mr. Norton, the Advocate General at Madras, one of those who condemn the Commissioners for the course they have taken, is obliged to observe that "the "reasons assigned for rejecting the penal Laws prevailing in the *provin-"ces* of India as a ground-work for a systematic general Code of Crimi-"nal Law for India are forcible and obvious. These Laws are incon-"sistent with each other, they are sometimes inconsistent with plain "justice, they are inadequate, and they are vague in point of expres-"sion." But he takes a different view respecting the English Criminal Law, which in opposition to the Commissioners, he recommends "as sup-"plying a safe and firm ground-work and ample materials for construct-"ing a Penal Code for this country, subject to such modifications with "respect to the condition, habits, and usages of the people, as the statute "organizing the Indian Commission points out;" while on the contrary, as has been already shewn, Sir R. Comyn, the Chief Justice at the same Presidency, emphatically declares that the English system is one which

he should be very far from advocating the extension of. There are some again who would have a body of Criminal Law for this country composed by a combination of the Regulations of Government with the principles of English Law administered by the Supreme Courts; while others eschewing English Law, would harmonize the Laws contained in the Regulations of the several Presidencies, and thereby construct a general system.

44. From the tenor of some of the animadversions upon the plan pursued by the Commissioners, it might be supposed that they had proceeded entirely upon theoretical views of their own, rejecting all the aids to be obtained from the Laws actually in force in India, whereas although they followed none implicitly, they took suggestions from all, so that Sir J. Awdry remarks how little (with certain grave exceptions) the Code departs from the substantial principles of the Law of England; and Mr. Norton, on the other hand, finds fault with it as paying too much deference in some parts to the body of Law contained in the Regulations for the guidance of the Company's Courts. The truth is, that the Commissioners not only took suggestions from the Laws actually in force in India, but borrowed also from the legislation of the most civilized Countries of Europe, thus availing themselves of the practical wisdom embodied in many various Codes, while at the same time they sought instruction in the works of learned jurists, calling in the lights of science, or the "philosophy of jurisprudence," to use the phrase quoted by Mr. Norton, to help them in judging of the aptitude of the provisions contained in these Codes, and in devising new provisions where none of them supplied rules which they approved. Such new provisions and the principles upon which they are founded, are in general fully expounded and defended in the notes to the Code, and the reasonableness of the principles and the fitness of the provisions are to be considered impartially, without permitting the judgment to be influenced by prejudices against them as innovations and untried theories.

45. After all, the novelty which is so much animadverted upon is more imaginary than real, and is to be found more in form than in substance. On this point we find Sir J. Awdry remarking that although some beneficial principles are as far as he is aware newly developed in the Code, the amount of really new matter contained in it is not so great as to give the Commissioners a claim to originality, while he "thinks "them entitled to the far greater praise of having seldom much disre-"garded the experience and recorded moral sense of the world."

46. The system of definitions and illustrations of definitions which has been adopted in this Code, is much criticised, and censured. The following are the explanations which the Commissioners have given of this leading feature of their plan. "One peculiarity in the manner in "which this Code is framed will immediately strike your Lordship in "Council. We mean the copious use of illustrations. These illustra-"tions will, we trust, greatly facilitate the understanding of the Law, "and will at the same time often serve as a defence of the Law. In our "definitions we have repeatedly found ourselves under the necessity of "sacrificing neatness and perspicuity to precision, and of using harsh "expressions, because we could find no other expressions which would "convey our whole meaning, and no more than our whole meaning. "Such definitions standing by themselves might repel and perplex the "reader, and would perhaps be fully comprehended only by a few Stu-"dents after long application. Yet such definitions are found in every "system of Law which aims at accuracy. A legislator may, if he think "fit, avoid such definitions, and by avoiding them he will give a "smoother and more attractive appearance to his workmanship: but in "that case he flinches from a duty which he ought to perform, and "which somebody must perform. If this necessary, but most disagree-"able work be not performed by the Lawgiver once for all, it must be "constantly performed in a rude and imperfect manner by every Judge "in the Empire, and will probably be performed by no two Judges in "the same way. We have, therefore, thought it right not to shrink from "the task of framing these unpleasing, but indispensable parts of a Code; "and we hope that when each of these definitions is followed by a col-"lection of cases falling under it, and of cases which, though at first "sight they appear to fall under it, do not really fall under it, the defi-"nitions and the reasons which led to the adoption of it will be readily "understood. The illustrations will lead the mind of the Student "through the same steps by which the minds of those who framed the "Law proceeded, and may sometimes shew him that a phrase which "may have struck him as uncouth, or a distinction which he may have "thought idle, was deliberately adopted for the purpose of including or "excluding a large class of important cases. In the study of geometry "it is found that a theorem which, read by itself, conveyed no distinct "meaning to the mind, becomes perfectly clear as soon as the reader "casts his eye over the statement of the individual case taken for the "purpose of demonstration. Our illustrations, we trust, will in a simi-"lar manner facilitate the study of the Law."

"We have, in framing our definitions, thought principally of mak-"ing them precise, and have not shrunk from rugged and intricate

" phraseology, when such phraseology appeared to us to be necessary to " precision. If it appeared to us that our language was likely to perplex " an ordinary reader, we added as many illustrations as we thought " necessary for the purpose of explaining it. The definitions and enact- " ing Clauses contain the whole Law. The illustrations make nothing " Law which would not be Law without them. They only exhibit the " Law in full action, and shew what its effect will be on the events of " common life."

" Thus the Code will be at once a statute book and a collection of " decided cases. The decided cases in the Code will differ from the " decided cases in the English Law Books in two most important points. " In the first place, our illustrations are never intended to supply any " omission in the written Law, nor do they ever, in our opinion, put a " strain on the written Law. They are merely instances of the prac- " tical application of the written Law to the affairs of mankind. Second- " ly, they are cases decided not by the Judges but by the Legislature, " by those who make the Law, and must know more certainly than any " Judge can know what the Law is which they mean to make."

47. The Commissioners on the Criminal Law of England "did not " think it expedient to illustrate the abstract rules and propositions in " the digest framed by them, by particular cases or examples, excepting " in the few instances where such illustrations were found already " moulded into rules, and therefore forming part of the existing Law." " It appears to us," they said, " that if an example falls clearly within " the terms of the rule, it is useless as an illustration; because the rule " is explicit without it; if on the other hand, the example borders upon " the verge of the rule, or does not fall clearly within its terms, it either " renders the rule doubtful, or the example itself constitutes the Law. " An illustration cannot, as is already observed, be of any use as a Law, " except to remove some doubt which would otherwise occur as to the " proper application of the Law to the case proposed, or to that and " others of a similar kind. But this very necessity proves the Law to " be imperfect, and shews the framer of the Law to have been aware of " an imperfection which ought to have been remedied by using terms " which either plainly excluded or included the proposed predicament. " Laws must frequently be ambiguous in their application, because it is " impossible to foresee all the various combinations of circumstances to " which it may be necessary to apply them, but it would argue great " negligence not to use terms which should clearly comprehend a case " not only within the knowledge of the law-maker, but even suggested " by him" 4th Report, p XVI.

48. The India Law Commissioners observe that "to unite preci-
"sion and simplicity in definitions intended to include large classes of
"things, and to exclude others very similar to many of those which are
"included, will often be utterly impossible." They thought that this difficulty might be best overcome by the use of illustrations. The English Commissioners apparently feeling the same difficulty, had recourse to the expedient of adding to the definitions expository clauses, where the definitions themselves are not sufficiently explicit, or where technical expressions are necessarily used, to "interpret them into popu-
"lar language and give them a precise meaning." After giving their reasons, as above, for not resorting to illustrations, "in order to guard
"against any misapprehension of their meaning," they say, "we do
"not assert that illustrations are not useful as leading to a knowledge
"and understanding of the Law, but that they ought not to form a part
"of the Law, so as to supersede or vary it, or to be of concurrent au-
"thority. There is, perhaps, no abstract rule or position in any science
"to the understanding of which the mind may not conveniently be led
"by the aid of familiar examples; they are indeed frequently the very
"steps by which the rule was first discovered, and its truth or propriety
"tested, and in either case must necessarily be included within it. It
"is, however, to be remarked, that none but plain and obvious examples
"are conducive even to the purposes of instruction; for predicaments
"to which the application of the proposed rule was doubtful, would
"serve to perplex rather than enlighten the mind." Here they appear to come pretty nearly to an agreement with the framers of the Indian Code, who in the passage above quoted in effect declare that they do not intend their illustrations "to form a part of the Law so as to supersede
"or vary it," "or to be of concurrent authority" so as to make anything Law which would not be Law without them, but simply to serve the same office as the expository Clauses in the digest of the English Commissioners, particularly those which are described in the following words,—"We have with a view to render the rules contained in the
"digest more generally intelligible, frequently applied the rules of Law to
"a detail of facts, where a more general and abstract enunciation of
"those rules would have been sufficient."

49. On this part of the plan of the Indian Law Commissioners Sir J. Awdry observes,—"Their method of illustration by examples
"is excellent. It is the practice in other sciences, and the want of
"it has been felt in Law. Mr. Livingstone occasionally uses it, but
"in a manner confused between illustration and enactment. Here
"it occupies its proper place, distinct from the enactment. They
"truly say that precision could not always be made consistent with

" neatness and perspicuity. They have preferred, and rightly, precision. " Their sentences are hardly more harsh, and are far less prolix and " involved, than those of legislation in general. But still they often *are* " and *must* be harsh, and at any rate the synthetical apprehension of " them is difficult to minds not accustomed to accurate thinking—but an " instance of the rule in action will lead the mind analytically to it. The " examples ought however, in my opinion, only to be looked at like those " in grammar, simply to lead the mind to apprehend the rule, not to " define its limits in doubtful cases, or the example becomes part of the " rule, and their statement that ' the definitions and enacting Clauses " contain the whole Law' will be falsified. A fictitious example should " only illustrate ; real examples like real history may instruct."

50. We understand the authors of the Code to have intended their illustrations to serve precisely the same purpose as examples in grammar, and as of examples in grammar or in any science it is not to be supposed that they ever " supersede or vary" the rule they are intended to illustrate, the same is in fairness to be presumed of the illustrations deliberately put forth to exemplify the intended action of the enactments contained in the Code. They shew as far as they go what the authors of the Code meant by the enactments. And it would be as unreasonable for a Judge to refuse to decide according to the illustration annexed to any enactment, in a case exactly parallel, as it would be in a student, in attempting to apply a rule of grammar, to refuse to follow the example set for the very purpose of guiding him in its application. Yet the example is not said to limit the rule. No more should the illustration be said to limit the enactment. Should it happen, accidentally, that the example is inapt, and such as, if followed, would "supersede or vary" the rule, in such a case, a most unlikely one, the student would exercise his reason, and finding the rule and example irreconcileable would properly follow the rule, concluding the example to have crept in by error. So also a Judge finding an illustration plainly at variance with the terms of the enactment, of the application of which it is exhibited as an example, would be at liberty to neglect it, and to apply the Law according to his own judgment of its meaning He would not be justified however in neglecting the illustration if he found it reconcileable with the terms of the enactment, although it did not agree with his own understanding of their import, any more than the Judge sitting in an English Court in a case depending upon the construction of a statute* would be justified in neglecting an established precedent among the decided cases in the English Law books, though it did not square with his own notions.

* In a case depending upon the Common Law, Precedents are of more authority—they may be said to be the Law

51. No more is the illustration a part of the enactment, than the example is a part of the rule in grammar, or a decided case upon the construction of a statute is a part of the statute, but each has a certain authority as a guide, and may not be unreasonably disregarded. For the purpose intended it seems to be a matter of indifference whether the examples be fictitious or real. The examples in grammar which Sir J. Awdry refers to as purely illustrative, are generally real examples. In geometry the cases taken for the purpose of demonstration are fictitious, invented for the occasion.

52. We have in the above remarks spoken of the examples in grammar as Sir J. Awdry has spoken of them, merely as illustrations, like examples in other sciences, but there is a material difference which it is proper to notice. The examples in grammar may indeed be *used* as illustrations. But they are the particular cases from which the rules in grammar are obtained by induction. They are the real authorities. The rules are merely what this or that grammarian has collected from them. In this view they resemble the decided cases in the Law books upon which rules of Common Law are founded.

53. It is of importance to ascertain what the authors of the Code really aimed at in framing it in the manner we have been considering, for it seems to have been greatly misunderstood, and some have been disposed to regard the work as a failure because it is palpably incapable of effecting completely what they imagine to have been designed.

54. Sir H. Compton observes that "the object of the Law Com-"missioners seems to have been by definitions and by illustrations of "definitions to give to the new plan that simplicity, clearness, and certain-"ty, which should render construction and analogical interpretation un-"necessary," and so "to expel from the penal jurisdiction of India what "has been called by Bentham *Judge made Law*;" and without any attempt to test those definitions and illustrations, he labours, otherwise, to prove that the supposed object is impracticable, or as he expresses it, in words which he says were applied to the definitions and illustrations in the Code of Louisiana, that "the very attempt is founded on a radical mis-"conception of the duty of Law-makers and the degrees of clearness "attainable by them," concluding his observations to this effect with the remark, that "it will be consolatory to the Law Commissioners to find "that if they have failed, they have failed in common with legislators, "ancient and modern, of the most enlightened nations."

55. Again Sir H. Seton, who criticizes the Code generally in the most candid spirit, observes that "the object seems to have been to

" exclude judicial discretion But however desirable it may be (and to " none more than to Judges) to limit judicial discretion, it is in vain to " attempt wholly to exclude it by definitions, however illustrated." " The terms 'fraudulently,' 'unjustly,' &c. so frequently resorted to in " the Code, obviously because no other definitions were practicable, are so " many admissions of the fact, and must ever render the Code with all " its precautions mainly dependant for its practical operation upon the " discretion of those by whom it is administered." The same view of the design of the Commissioners is taken by others, whose animadversions are less moderate.

56. But in truth the Commissioners aimed at nothing more than what Sir H. Seton admits to be desirable, to *limit* judicial discretion. They never entertained the fond idea that they could exclude it. Observing that the illustrations are meant to take the place of decided cases in the English Law Books, with this difference that "they are cases decided " not by the Judges but by the Legislature, by those who make the Law, " and who must know more certainly than any Judge can know what " the Law is which they mean to make," they say " this collection of cases "decided by legislative authority will, we hope, greatly *limit* the power which " the Courts of Justice possess of putting their own sense on the Laws. " But we are sensible that neither this collection of cases nor any other " can be sufficiently extensive to settle every question which may be " raised as to the construction of the Code. Such questions will " certainly arise, and unless proper precautions be taken, the decisions " on such questions will accumulate till they form a body of Law " of far greater bulk than that which has been adopted by the " Legislature." Here the exercise of judicial discretion is supposed; limited in some degree but not excluded; rendered unnecessary in cases to which the illustrations will apply, as it is unnecessary, in Courts governed by English Law, in cases to which applicable precedents are to be found in the English Law books, but still necessary in all other cases.

57. It is observed that there are at present eight Chief Courts subject to the Indian Legislature, every one at liberty to put its own construction on the Law ; and as it is not to be expected that they will always adopt the same construction, there will be in the course of a few years a large collection of opposite decisions all of equal authority. This is an evil against which it is proper to provide, but it is not proposed to do so by excluding judicial interpretation. The suggestion is to narrow the field for the exercise of judicial discretion by frequent revisions of the Code, and making every successive edition of it solve all the impor-

tant questions as to its construction which have arisen since the appearance of the last edition. Intermediately the Courts are intended to apply the written Law as well as they can on the grounds of reason, with this reserve, that the accused party shall have the advantage of a doubt, if that doubt be entertained after mature consideration by the highest judicial authority.

58. Sir J. Awdry supposes the Commissioners to assume that the office of interpretation essentially belongs to the Legislature, and argues against this doctrine as unphilosophical, inexpedient, and unconstitutional. But the Commissioners merely say that this doctrine was maintained by the Roman jurists, and that the contrary opinion was censured by them with great force of reason. They then explain how their illustrations differ from the imperial rescripts, in that they are not made ex post facto, and cannot therefore be made to serve any particular turn. They say expressly " we do not think it desirable that the Indian Le-" gislature should, like the Roman Emperors, decide doubtful points of " Law which have been mooted in cases pending before the tribunals."

59. This explanation seems to anticipate the objections urged by Sir J. Awdry, and manifests that there was no intention "to repeal that " rule of the British constitution which places interpretation and legisla-" tion in different hands, by which it ordinarily belongs to the Judges " (subject to correction) *jus dicere*, to pronounce what the Law is, to the " Legislature *jus dare*, to ordain what it shall be." Indeed Sir J. Awdry after arguing generally against the assumption by the Legislature " of " the totally distinct office of interpretation," acknowledges that the Commissioners do not in fact assign that office to the Indian Legislature, though he says " they claim it in principle." Even this assertion however is not warranted, pointed as it is to interpretation to be exercised in " reconsidering decided cases." At the utmost the Commissioners claim a right in the Legislature to pass declaratory Laws, such as Sir J. Awdry himself alludes to as exercised by Parliament, and of which he observes " such a power if it exist, is different from the " ordinary power of interpretation "

60. In order to the proposed revisions of the Code the Commissioners suggest that the doubts or differences of opinion that may arise in the Courts as to the construction of its enactments should be reported to Government to be considered in the Legislative Department. " In some " cases," the Commissioners observe, " it will be found that the Law is " sufficiently clear, and that any misconstruction which may have taken " place is to be attributed to weakness, carelessness, wrongheadedness,

" or corruptions, on the part of an individual. In such cases it will be " unnecessary to make any change in the Code. Sometimes it will be " found that a case has arisen respecting which the Code is silent. In " such a case it will be proper to supply the omission. Sometimes it " may be found that the Code is inconsistent with itself. If so, the " inconsistency ought to be removed. Sometimes it will be found that " words of the Law are not sufficiently precise. In such a case it will " be proper to substitute others. Sometimes it will be found that the " language of the Law, though it is as precise as the subject admits, " is not so clear that a person of ordinary intelligence can see its whole " meaning. In these cases it will generally be expedient to add " illustrations such as may distinctly shew in what sense the legislature " intends the Law to be understood, and may render it impossible that " the same question, or any similar question, should ever again occasion " difference of opinion."

61. The Commissioners remark that an addition of a very few pages to the Code in each successive edition, " will stand in the place " of several volumes of reports, and will be of far more value than such " reports, in as much as the additions to the Code will proceed from the " Legislature, and will be of unquestionable authority, whereas the " reports would only give the opinions of the Judges, which other " Judges might venture to set aside."

62. This remark obviously applies to the additional illustrations as well as to the alterations supposed to be made in " the definitions and " enacting Clauses," which, in the original edition of the Code, are, they say, to be regarded as " containing the whole Law," and seems to ascribe equal authority to both. Noticing this Sir J. Awdry observes that " the new illustration will, when introduced with the same autho- " rity as the rest of the enactment, merely be an unusual form of enact- " ment, limiting, extending, or otherwise qualifying the provision. The " doctrine that the provision itself contains the whole Law will certainly " be falsified by giving, as the Commissioners propose, to this illustration " legislative authority. It will *therefore* not strain the Law, where it " is required to make language which is as precise as the subject admits " of, sufficiently intelligible, simply because it is a modifying part of that " Law. The method is new. I do not know where it is (contrary " to the view of the Commissioners) an avowed part of the Law, and " not retrospective, that it is inexpedient, nor when these are no longer " fictitious cases (as to which I have before expressed an opinion) but " the results of experience, can I say that in enacting that such and " such cases shall or shall not be deemed to be included may not be effec-

" tual, at the same time that it is easier than amending the body of the " Clause, as well as more authoritative than the judicial decision that " they are comprehended or not in its obscure terms."

63. Though it is not in terms so declared, it does indeed appear that the new illustrations in the successive editions of the Code are intended to be a part of the Law, and consequently absolutely binding upon those who have to administer it, and so to differ in character from the illustrations in the original edition. The hypothesis is that some definition or enactment has been misunderstood, and a wrong construction given of it. The illustration is authoritatively to extend, or limit, or otherwise qualify the construction. It is in effect a declaratory Law. Whereas the illustrations in the original Code are as has been observed merely examples, but examples clothed with an authority entitling them to the highest respect, though not absolutely binding. The difference however is of so little consequence practically that we are not sure that it would not be better to treat the illustrations in the original Code, as well as in the successive editions of it, as parts of the Law, of concurrent authority with the definitions and enactments.

64. With respect to the objection which has been made to the Code on the ground of the multitude of new offences created by it, we think that this will be best discussed in considering the particular provisions to which it applies. It will be found that exception is taken on this ground to some of the provisions in the chapter "of offences against property," upon which we have submitted our observations in the proper places.

65. Many persons have found fault with the composition of the Code as being in many places framed in a style very difficult to be understood, some indeed have pronounced parts of it to be unintelligible, and several have declared their opinion that it is incapable of being translated, and therefore useless for the general purpose for which it was intended. We have carefully considered the Clauses in the chapters we have reviewed which have been pointed out as affording grounds for this censure, and upon each we have given our opinion. The criticisms on this head are anticipated, and we think are sufficiently answered by the observations of the authors of the Code which we have already quoted. With respect to the " ruggedness of phraseology" which some have been offended with, in addition to what the authors of the Code have said for themselves, we submit the following concurrent remarks of the English Criminal Law Commissioners upon their own work:—" Ele-
4th Report, p 13. " gance of diction must be regarded as a matter of inferior importance in the

" declaration of abstract propositions and rules, and we have not hesi-
" tated to use plain and even homely language in our Articles where a
" neater construction of the sentences and more refined expressions
" would have not contained so effectually the meaning of the Law."
We would recommend attention generally to the observations of the English Criminal Law Commissioners on the manner in which the definitions and rules of the Criminal Law ought to be expressed, which are to be found in the 4th and 7th Reports.

4th Report p. 12 & Seq.
7th Report p. 6 & Seq.

66. Sir J. Awdry as we have shewn has declared his opinion that " the sentences in the Code are hardly more harsh, and are far less " prolix and involved than those of legislation in general."

67. We apprehend that the opinions which some have expressed of the obscurity, almost unintelligibility, of particular Clauses, have been formed without such study as a Judge would be bound to bestow upon them, and we are strongly inclined to think that there is scarcely any one of those who, as we conceive, have somewhat rashly delivered such opinions, that being called upon as a Judge to construe the Clauses in question would feel himself at a loss to determine their meaning.

68. Mr. A. D. Campbell is one who has pronounced the Code to be " absolutely untranslatable," but the instance he adduces is not very convincing. " It will be no easy task," he says, " to convey in any of " the Native dialects the meaning even of No. 24, which merely declares " that 'to do a thing' denotes omissions as well as acts; for in every " language 'to do' must stand opposed to its omission." We can only say that if there were no greater difficulty than this to be overcome the task of translation would in our estimation be an easy work. We do not however think that it will be an easy work; on the contrary we are of opinion with the authors of the Code that " the difficulty of procuring " good translations will be great;" but we concur with them also in believing that the means at the disposal of the Government of India " are sufficient to overcome every difficulty" of this nature. Indeed when we consider what has been done in India by comparatively private means in the way of translating the scriptures, we are at a loss to understand how there can be a doubt on the subject. We may advert also to what has been actually accomplished in the translation of the Regulations of the several Presidencies and the Legislative Acts of the Government of India, in which we will venture to say are to be found as great difficulties as any that are to be met with in the Code. We would instance in the Acts, the Preamble to 5 and 6 Victoria, Chapter 39, recited in Act XX. of 1844, the Statute recited in Act IX. of 1842, and Section 1 of

He writes 42.

Prefatory address to the Governor General in Council, p. 11.

Act XXX. of 1839. In the Code of the Regulations for the Presidency of Fort William, not to multiply examples, we would point to the Preamble of Regulation I. of 1821, and to the important Regulation VII. of 1822.

69. The object we conceive should be "by the combined labour "of enlightened Europeans and Natives" to make as good a translation as possible into one Native language, known more or less all over India, that is to say the Oordoo, to be used as an approved model in making versions into all the other languages into which it is usual to translate the Laws enacted by the Government of India. This we believe was the course taken lately in translating the new Articles of War.

70. We proceed to review the Chapters we have mentioned, in the order in which they stand in the Code.

CHAPTER I.

GENERAL EXPLANATIONS.

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71. Mr. Norton says, " This Chapter appears to me to exem- " plify vagueness and uncertainty in language," and " to contain many " incorrect positions, and some that are arbitrary and inconsistent."

72. Mr. Norton finds vagueness and uncertainty in what appears to us so explicit and definite, that, but for the instance he affords in his own case, we could not have supposed it possible to be misconceived by any instructed person endeavouring to understand it. Thus he says, he " cannot see clearly why (Clause 4) starving a man to death is consi- " dered no act, but an omission." Now in the Clause referred to, it is laid down that " wherever the causing of a certain *effect* by an *act* " or by an *omission* is an offence, it is to be understood that the causing " of that effect partly by an act and partly by an omission is the same " offence." In the " illustration" the *effect* supposed is death, partly caused by an *act*, beating, partly by an *omission*, not supplying food. The word " starving" used by Mr. Norton, does not occur. As far as we know, Mr. Norton is singular in his inability to see the distinction between " act" and " omission" so illustrated, and we do not apprehend that there will be any difficulty generally in discerning it. Again it is declared in Clause 9 of this Chapter that the words " Government of India" denote the Executive Government of India, unless it be otherwise expressed. Upon this Mr. Norton remarks—" I do not know what is " meant by the Executive Government as the explanation of the Govern- " ment of India." Now of course Mr. Norton well knows that the constitution of the Government of India for Legislative purposes is different from its constitution for all other purposes; that for legislative purposes it consists of the Governor General and a Council of four Ordinary Members, and for all other purposes, of the Governor General and a Council of three Ordinary Members, the fourth Ordinary Member not being entitled to sit and vote in Council except at meetings for making Laws and Regulations; and that it is enacted that " all Laws and Regulations shall be made at " some meeting of the Council at which the said Governor General and at " least *three* of the Ordinary Members of Council shall be assembled, and

Clause 4.

Clause 9.

3 and 4 Wm. IV Cap 85. Sec XL.

Sec XLVIII.

" that *all other functions* of the said Governor General in Council may be " exercised by the said Governor General and *one* or more Ordinary " Member or Members of Council." It is difficult to conceive that Mr. Norton knowing all this, can be in earnest in saying he does not know that the Governor General in Council exercising "all other functions," except the function of legislation, is what is meant by the Executive Government of India.

Clause 3.

73. Mr. Norton speaking of Clause 3, says, " I am unable to see " clearly what is meant by, or what is the reason of, the limitation of " a joint act to those specifically which are said to consist of offences by " causing a certain effect with a certain intention or with a knowledge of " certain circumstances." It might be replied, that Mr. Norton has not been very happy in expressing his own meaning. Perhaps he would have had a clearer view of the matter if, attending to the words of the Clause, he had considered whether any case is excluded which ought to be included. It does not appear so to us.

Clause 7.

74. In Clause 7, it is explained that the word " party" denotes collections of persons, as well as persons. Sir H. Seton questions " the " use of 'party' for person." " The word party in a legal sense," he observes, " signifies a person who is party in a cause or to a deed, &c. " It implies the existence of some other party. It is a person of a par- " ticular description." The intention however is not that the word " party" shall be used for " person" generally, but simply to explain that it may comprehend a body, such as the Government of India, the Bank of Bengal, &c. as well as an individual. It seems to be used in this Code only in some such particular sense as is indicated by Sir H. Seton, and as it is used in the Digest of the English Criminal Law Commissioners.

Clause 12

75. Upon Clause 12, which explains the word " Judge," it has been asked whether a *Magistrate* or *Criminal Judge* investigating a case in which the party accused must be committed, if there is evidence against him, for trial by a Judge of superior jurisdiction, or a Judge trying a case in which the sentence rests with the Sudder Court, is comprehended in its terms. It is clear that every person " officially designated as a Judge" is included. The illustration *(b)* shews that a *Magistrate* sitting on a charge on which he has power to sentence to fine or imprisonment with or without appeal, is a Judge. A Magistrate conducting a preliminary investigation to ascertain whether there is ground to put an accused party on his trial by a Judge, it would seem, is not to be considered a Judge under this Clause.

76. Mr. Norton says he does not know if Arbitrators are included as Judges. Arbitrators "empowered by Law to give a definitive judgment," as for example under Regulation XVI. of 1793 of the Bengal Code, and the corresponding Regulation XXII. of 1802 of the Madras Code, we apprehend, are included.

77. Under Clause 14, Mr. Norton supposes that the first class of public servants therein described, viz. "every Covenanted Servant of "the East India Company," may be taken to include Covenanters with Government by Charter party. This is a mistake, which, considering the positive sense that the term "Covenanted Servant" bears in the Company's Territories, we deem to be most unlikely. Clause 14.

78. Mr. Norton notices the comprehensiveness of some of the other descriptions of public servants, and observes on the whole, that he "can hardly tell what existing person may not be included under "the term 'public servant.'" Supposing the several descriptions he specifies to be as comprehensive as he takes them to be, yet it does not appear to us that they are faulty in this respect, with reference to the provisions in the two Chapters relating to public servants in the application of which recourse will be had to them. We think they will be found sufficiently distinct and definite for the purpose they are to serve. We have no apprehension that there will be any difficulty in determining who are positively excluded as not falling under any of the descriptions in Clause 14. Chapters VII. and VIII.

79. It is questioned by one Officer whether Juwabnevisses, Gomastahs, and other Servants of that class, come under any of the descriptions in this Clause so as to be subject to the provisions of Clause 138. It seems to us that as servants whose duty it is "to make" or "keep documents" they fall under the 5th, 10th, or 11th description, according to the Department in which they may be employed.

80. With reference to Clauses 15 and 16 Mr. Norton says—"It "appears to me an incorrect position to include (as may be) highway robberies among 'frauds' as by 'causing wrongful gain to one party by "'means of wrongful loss to another party.'" "Wrongful gain" and "wrongful loss" are explained in Clause 15; and in Clause 16 it is said— "Whoever does any thing with the intention of causing wrongful gain "to one party, by means of wrongful loss to another party, is said to do "that thing fraudulently." In the definition of theft in Clause 363, a chief ingredient is the intention "to take fraudulently any thing which "is property." It is said in Clause 375, that theft is "robbery" if Clauses 15 and 16.

attended with certain aggravations Hence arises Mr. Norton's remark, that by the definition in Clause 16, highway robberies may be included among frauds. The remark we think does not affect the correctness of the definition of the term "fraudulently." The propriety of using this term in the definition of theft and robbery will be considered in the proper place.

81. With reference to these and other Clauses in which the term "property" is used without a definition of it, an Officer observes that in discussing the Code with Natives the meaning of the term was questioned; and he suggests that it is a point on which disputes are likely to arise.

82. In the book of definitions annexed to Mr. Livingstone's Code, it is said that the term "property conveys a compound idea composed of "that which is its subject, and of the right to be exercised over it." We believe that the term "property" is every where used in this Code so as to be applicable exclusively to "that which is its subject," and we imagine that the expression so used was thought by the framers of the Code to be sufficiently intelligible by itself, and as clear as it could be made by the help of any set of words in the form of a definition. And so far as we have considered the provisions relating to "property" and the illustrations thereof, it does not appear to us that there is need for any explication of the term In this view we are confirmed by finding that there is no question raised about it, in the papers referred to us, by any one but the individual whose observation we have noticed.

Clauses 17 and 18

83. Referring to Clauses 17 and 18, Mr. Norton says, "it appears "both arbitrary and inconsistent to attribute possession to cestuiqui trusts, "and to guardians, of those things which are put into a wife's or servant's "possession in trust for the husband or master, or into an idiot's possession," as for instance, without "the consent or knowledge of the husband, "master, or guardian." And Mr. Greenhill suggests that words should be added in Clause 18, specifying that the possession of the idiot, &c. is "with the knowledge of the guardian." The objection would have weight, we think, if such constructive possession could be charged against the party so possessing, as a criminal possession, in order to bring him within the definition of any offence, and to render him liable to a penal prosecution. But we are not aware that the Clauses in question are capable of being so perverted under any of the provisions of the Code; and they appear to be necessary with a view to precision in criminal charges affecting other parties in respect of property so situated, in which it may be material to declare in whom the possession rested at a certain time, as, for example, in charges of theft under Clause 363

See Note N p 76 and 77

84. Upon Clause 19 which explains that "property is not said to "be in the possession of any party other than a person," and upon the illustration which shews that property is not to be considered as in the possession of the Government of India, the Bank of Bengal, &c., but of the persons in trust for those parties, Sir H. Seton observes that "the sole "object of this explanation seems to be to convert theft from a body of "persons into criminal breach of trust, see Clause 363. If so," he asks "whether it does not fall under the rule as to General Exceptions, Note "B. page 15, viz. that it ought to be appended to the rule which it is "intended to modify." He asks again "why should not property in the "possession of a body of persons be protected from theft? It is so by "the Law of England." To these remarks and questions it may be answered that property belonging to a body of persons *is* protected from theft committed by any but the person who has possession of the property in trust for the owners. Such a person making away with the property committed to his keeping by a body of persons is not guilty of theft, but of a criminal breach of trust. See Illustration (x) under Clause 363. Any other person stealing such property will be guilty of theft, but of theft from the person who, according to the illustration under Clause 19, is considered to have possession in trust for the body to which the property belongs. Clause 19.

85. Upon Clause 21 explaining the signification of the word "documents," Sir H. Seton puts the following questions: Clause 21.

"Why should the term 'document' which in a popular sense has "a more extensive meaning, be limited to writing, which with the expla-"nation given, would exactly convey what is meant?"

"Why should a Gazette, a Proclamation, &c., cease to be documents? "they are usually classed among documentary evidence by the English "Law?"

"Whether the explanation has not reference solely to the Chapter "relating to offences relating to documents and ought not therefore "to have been inserted in it?"

86. Mr. Norton also says it appears an arbitrary definition of a document to confine it to hand-writing.

87. Mr. Greenhill observes that a printed or lithographed paper bearing the *seal* or *stamped signature* of a person unable to write would not be a document under the explanations given in this Clause. He alludes to this, he says, as seals are used in India without hand-writing.

Art. 3, Chap. XXIII.

88. The term "writing" which Sir H. Seton suggests to be used instead of "document" as conveying exactly what is meant, is defined in the Digest of the English Criminal Law Commissioners "to signify "*any material* on which any words or figures, at length or abridged, are "written, *printed*, or *otherwise expressed*, or any map or plan is des-"cribed." In Mr. Livingstone's book of definitions it is explained that "wherever the contrary does not appear from the context the word "writing means not only words traced with a pen, or *stamped*, but *prin-"ted*, or *engraved*, or made legible by *any other device*." It is obvious that these explanations of the term "writing" make it more comprehensive than the word "document" as it is defined by the Indian Law Commissioners, and they seem to be open to the objection that they give a meaning to the term more extensive than that which the word "writing" conveys in a popular sense, as the explanation of "document" in the Clause under consideration, on the other hand, as Sir H. Seton remarks, comes short of the popular sense of its meaning. Another difference between the definition of "writing" in the Digest of the English Criminal Law Commissioners and that of "document" in this Clause is that the former applies to the *material* on which words are written, &c. whereas the latter applies to the matter written, &c. Mr. Livingstone's definition of "writing" also applies to the words written, &c. Both the definitions referred to would embrace the seal used instead of a signature, or the stamped signature, alluded to by Mr. Greenhill, which the definition in this Clause appears to exclude, but which we incline to think ought to be included. We are not aware indeed of any reason why the definition of "document" in this Code should not be as wide as that of "writing" in the Digest of the English Criminal Law. It is dangerous, however, so much to extend the terms of a definition lest what depends upon it in the sequel should be deranged. Perhaps Sir H. Seton's suggestion of placing the definition in the Chapter "of offences relating to Documents" for which it seems to have been framed might be adopted on the principle stated in the 2d para. of Note B in regard to Special Exceptions, altering it so as to include a paper bearing a seal intended to serve instead of the signature of a name, or the stamped signature of a name intended to serve instead of the same written with a pen.

Clause 22.

89. With reference to Clause 22 which explains what is meant by the words "valuable security," Sir H. Seton asks "would not a cancel-"led instrument be 'a valuable security' under this Clause?" We think not; for an instrument available for the purpose for which it was made is clearly what the Clause intended; a cancelled instrument therefore, though by the cancelling of it a legal right may be "extinguished," in as much as the instrument upon which such right depended is thereby voided, does not fall within its scope.

90. In Clause 26 it is explained that "a person is said to cause "an effect 'voluntarily' when he causes it by means whereby he inten- "ded to cause it, or by means which, at the time of employing those "means, he knew to be likely to cause it." The latter part of this definition, which goes beyond the intention, to the obvious consequences of an action, is highly approved by Sir J. Awdry, but is disapproved by others. We shall consider the point in reviewing the Chapter of General Exceptions. Clause 26.

91. Colonel Sleeman objects to that part of Clause 28 which makes the term "illegal" applicable to every thing "which furnishes ground for a Civil Action." These appear wide words, but we think it would be difficult to restrict them without the risk of excluding something that ought to be included. Generally we apprehend it will be found unobjectionable to designate as illegal any thing done or omitted to be done by a man for which he is liable to a Civil Action. Clause 28

92. Upon the explanation of "intelligent consent" in Clause 31 Sir H. Seton questions whether the word 'consent' does not necessarily import the capacity of the party giving it, implying that the definition is unnecessary. Mr. Norton observes that it is arbitrary and inconsistent to attribute to "intelligent consent" that consent "which may "have been given under deception," implying that there ought to be a definition, but that the one which is given is too wide. Sir H. Seton we conceive would construe the word "consent," which he appears to consider sufficient by itself, to include consent given under deception, supposing the party to be capable of consenting at all, or able "to un- "derstand the nature and consequences of that to which he gives his "consent." Even supposing with Sir H. Seton that the definition is superfluous, which we do not think, it can do no harm. We do not think it would be proper to consider "a consent given under deception" as not an "intelligent consent." Clause 31.

93. It has been suggested that it would be dangerous to put consent given under the influence of "passion" out of the pale of "intelligent consent," as in the definition, and we are rather inclined to that view.

94. It would seem that the definition of "a person of Asiatic blood" contained in Clause 32 has no relation to any provisions of the Code but those contained in Clauses 43 and 44 in the Chapter of Punishments, and it appears to us that on a principle analogous to that stated in the 2d para of Note B. on the Chapter of General Exceptions, it should be introduced as an explanation immediately after those Clauses, in connection with which we shall examine it. Clause 32.

CHAPTER III.

GENERAL EXCEPTIONS.

95. In Clause 26, as already noticed, it is explained that "a person is said to cause an effect 'voluntarily' when he causes it by means "whereby he *intended* to cause it, or by means which at the time of employing those means he *knew to be likely* to cause it." In Clause 69 in this Chapter it is declared that "nothing which is *not intended* to "cause death and which is not *known by the doer to be likely* to cause "death, is an offence by reason of any harm which it may cause," &c. if the sufferer has consented to suffer that harm, &c. In Clause 70, it is declared that "nothing which is *not intended* to cause death is an offence "by reason of any harm which it may cause," &c. if the sufferer has consented to suffer that harm, &c. In Clause 294 in the Chapter of Offences affecting the human body, it is set forth that whoever does any act "with the *intention* of thereby causing, or with the *knowledge that* "*he is likely thereby* to cause the death of any person, and does by "such act cause the death of any person, is said to commit the offence "of 'voluntary culpable homicide.'"

96. Sir J. Awdry observes with reference to the above explanation and the definitions corresponding with it, that "the general purpose of "avoiding fiction and adhering to strict truth is excellent. For this "reason I think the Commissioners have done well in subjoining to "'intending,' the phrase 'or knowing that he was likely to produce such "an effect,' instead of leaving it to the legal presumption that a man "must be taken to intend the obvious consequences of his wilful acts."

97. Mr. Norton on the other hand deems that the Commissioners have erred. He says "It appears to me impossible to read as far as "this Chapter* without suspecting that the Commissioners have some "peculiar object in distinguishing on so many occasions between the "doing an act 'with an intention' to effect a certain result, and the "doing it with a '*knowledge* that it is *likely*' to produce that result. "Now there appears to me an error in principle in legislating on any such "distinction, and I mention it the more pointedly at this opportunity, "because I think the present Chapter will afford more than one instance "of the uncertainty, and even of the absurdity, which may arise from the "applications of such a distinguishing doctrine. The principle of "English Law is that a man's intentions and designs are to be judged of

* Chapter XVIII.

" by the quality of the act done, and that he shall be *presumed* to have " intended that which his act was naturally likely, or calculated to effect. " But, if the Commissioners' distinction above noted is really intended, " and is to prevail, in estimating the substantive quality of an act, it " will follow that a man is to be supposed capable of designing a thing " by means not at all likely, and which he knows not to be likely, to " effect it, or, on the other hand, he is to be supposed capable of doing a " thing which he knows to be likely to cause a certain effect, and at the " same time not to intend that result."

98. Mr. A. D. Campbell makes the following remarks. " At " Clause 26 it is declared, that a person is said to cause an effect " 'voluntarily' either 'when he causes it by means whereby he *intended* " to cause it; *or, by means which* at the time of employing these means " *he knew to be likely* to cause it;' I greatly doubt the propriety of the " latter part of this definition, especially with reference to the distinction " subsequently drawn by the Commissioners themselves in Note B. " page 17, between acts which they there distinguish as '*voluntary, yet* " *not intentional*,' that is to say, when the person who caused death did " not *mean* to cause it, but *knew* that he was *likely* to cause it. They " add, what appears to me no less important than most appalling—'*in* " *general*, we have made *no distinction* between cases in which a man " causes an effect *designedly*, and cases in which he causes it with the " *knowledge* that he is likely to cause it.' "

" They then go on, in illustration of the cases of consent excepted " from this very extraordinary rule, in which on the contrary, they dis- " tinguish the intent from the knowledge possessed of the likely result, " to instance a fatal operation by a Surgeon, and a shot fired at a wild " beast, attacking a man, which kills the latter; as exhibiting *no intent* " whatever to cause death, yet the possession of *knowledge* that the act " *was likely* to cause it. Now the only knowledge possessed, in both " these instances, seems to me to have been the very reverse of that " which is here erroneously stated by the Law Commissioners, and to " have coincided precisely with the intent itself. The knowledge " possessed was, that the act of man was, in these instances, the sole " means left to *prevent*, not to *cause*, death; and the intent was the very " same, not to *cause* but to *prevent* death. The *likelihood* decidedly " was the *prevention* of death by the act of man, and the fatal alterna- " tive was *not* as the Law Commission erroneously state, any *likelihood* " but the mere *improbable* result of the failure of his best endeavors to " prevent that death, which by the act of God, was, otherwise, quite " inevitable."

"But because the Law Commission, in these two instances, intend-
"ing to give illustrations of the distinction between 'intent' and 'know-
"'ledge of likelihood' chance unfortunately to have here quoted two
"cases, in which they happen on the contrary to coincide, instead of
"differing from each other, there is no reason whatever thence to ques-
"tion the correctness of the most important distinction here drawn by
"the Law Commissioners themselves between crimes produced by
"'intent,' as contradistinguished from such as are caused 'without
"'intent,' yet are accompanied by a knowledge on the part of the causer
"of the result '*likely*' to be produced, and there seems, on their own
"admission of such distinction, the very strongest reason for doubting
"the propriety of their having made no such distinction 'in general.'
"My decided impression is that, throughout the Code, the glimmering
"here given by the Law Commission of this highly important distinction
"is altogether lost sight of, and that these two phrases, which, though
"they may occasionally express the same, may also, as here admitted by
"the Law Commission, often express very different, if not opposite,
"things, have been nearly universally used in the Code, in the most
"dangerous manner, as really convertible terms."

Note B, Page 17.

99. It appears to be necessary only to quote the words of the Commissioners in the passage referred to by Mr. Campbell, in order to shew that there was no such confusion as he imagines in their views on this subject.

They say, "In general we have made no distinction between cases
"in which a man causes an effect designedly, and cases in which he
"causes it with a knowledge that he is likely to cause it. If, for
"example, he sets fire to a house in a town at night, with no other
"object than that of facilitating a theft, but being perfectly aware that
"he is likely to cause people to be burned in their beds, and thus causes
"the loss of life, we punish him as a murderer. But there is, as it
"appears to us, a class of cases in which it is absolutely necessary to
"make a distinction. It is often the wisest thing that a man can do to
"expose his life to great hazard. It is often the greatest service that
"can be rendered to him to do what may very probably cause his death.
"He may labor under a cruel and wasting malady which is certain to
"shorten his life, and which renders his life, while it lasts, useless to
"others and a torment to himself. Suppose under these circumstances
"he, undeceived, gives his free and intelligent consent to take the risk of
"an operation which in a large proportion of cases has proved fatal, but
"which is the only method by which his disease can possibly be cured,
"and which, if it succeeds, will restore him to health and vigor. We

" do not conceive that it would be expedient to punish the Surgeon who " should perform the operation, though by performing it he might cause " death, not intending to cause death, but knowing himself to be likely " to cause it. Again, if a person attacked by a wild beast should call " out to his friends to fire, though with imminent hazard to himself, " and they were to obey the call, we do not conceive that it would be " expedient to punish them, though they might by firing cause his death, " and though when they fired they knew themselves to be likely to cause " his death."

" We propose therefore that it shall be no offence to do even what " the doer knows to be likely to cause death if the sufferer being of ripe " age has, undeceived, given a free and intelligent consent to stand the " risk, and if the doer did not intend to cause death, but on the contrary " intended in good faith the benefit of the sufferer."

100. The Commissioners saw clearly the difference between " intent" and "knowledge of likelihood," and meant to express it distinctly, in order to avoid the necessity of fiction in laying a charge, as for example by imputing " intent" constructively where the circumstances imply only " a knowledge of likelihood," advisedly intending, as they did, that there should be no distinction in general, in respect of penal consequences, between cases in which a man causes an effect which is an offence designedly, and cases in which he causes it by doing what " he knows is likely to cause it." Advisedly intending this in general they worded the enactment so that the charge may be always expressed according to the truth. The exception which the Commissioners thought it necessary to make for the reasons stated in the passage we have cited, of cases in which a person does to another with his consent what he knows is likely to cause his death, intending not to cause his death, but to relieve him from suffering, is contained in Clause 70. It appears to us to be quite justified by the reasons stated.

101. We cannot agree with Mr. Norton that because in laying a charge against a man it is to be distinctly expressed according to the truth, as it is to be gathered from the circumstances, whether he intended the effect the causing of which is the offence imputed to him, or did the act from which such effect resulted not intending to cause such effect, but knowing it to be likely that such effect would result from his act, " it " will follow that a man is to be supposed capable of designing a thing " by means not at all likely and which he knows not to be likely to " effect it."

102. The alternative deduction that "a man is to be supposed "capable of doing a thing which he knows to be likely to cause a certain "effect and at the same time not to intend that result," we do not dispute; on the contrary we hold it to be true; and therefore we think that the distinction in question is reasonable and proper.

103. The above definition of the term "voluntarily" in this Code agrees pretty nearly with the definition of the word "wilfully" in the Digest prepared by the Commissioners on the Criminal Law of England. In Article 2, Section 3, Chapter 1, it is laid down that "A hurt, damage, "or other evil consequence of an act, shall be deemed to have been "caused *wilfully* where the doer of the act *intended* such consequence to "result, *or knew or believed that it was likely* to result from his act, "or, where knowing or apprehending that such consequence would "*probably* result from his act, he wilfully incurred the risk of causing it."

104. It will be observed that this definition differs from that of the Indian Law Commissioners only in having a third branch or member besides the two contained in the latter, namely, the knowledge or apprehension that the effect or consequence in question would *probably* result from the act done.

105. It seems to us that the objections of Mr. Norton and Mr. Campbell, and of others to the same effect, are fully answered by the observations of the English Criminal Law Commissioners in explanation and defence of the above definition. We submit a few extracts. Upon
7 Report p 22 the subject of "Wilful injuries" they say, "We now advert to a large "class of cases where, although the injurious consequence which occurs "be not that directly *intended* and to which the offender has adapted his "means, he yet clearly possesses the *mens rea*, and where we think the "act may properly be regarded as wilful. This class includes all who, "knowing or believing that the acts which they do are *likely* to occa-"sion an injurious result, or that hurt or damage will probably result, "wilfully incur the risk of causing the injurious consequences by doing "those acts."

"We have framed our definitions of crimes with reference to the "general principles above referred to; in so doing we have included "within the predicament of *wilful* offenders, not only such as directly "intend to inflict a particular injury, but also all such as wilfully and "knowingly incur the hazard of causing it."

p 23. 106. In further explanation they say, "The proper test of guilt "in such cases is that of knowledge and consciousness on the part of the

" malefactor that hurt or damage is likely to result or will probably result, " from what he does; his criminality consists in the wilfully incurring " the risk of causing loss or suffering to others. The case of a party so " misconducting himself, and so regardless of the interests of others " seems to be undistinguishable in point of legal guilt and penal con- " sequences from that of a criminal who acts with the most direct in- " tention to execute an illegal purpose, and it seems to us that he may " properly be described as the voluntary author of the mischief pro- " duced. The principle of exemption from criminal responsibility in " respect of a hurtful consequence is that of bonâ fide ignorance of the " connexion existing between the mere mechanical act and its conse- " quence. That principle ceases to operate where the connexion is " known to be either certain or probable. If the doer of an act know " or believe that a noxious consequence will result from that act, he " is just as culpable both in Law and Morals as if he had acted with " the most direct intention to hurt. Let it however be supposed that " the consequence is not* certain, but that it is a likely or probable con- " sequence, and that the likelihood or probability is known to the doer of " the act. Here again it is clear that the principle of exemption above " mentioned is unavailable to exempt the offender from liability in " respect of the consequence. All he can urge is, that he was not sure " that the hurtful consequence would follow; but he had no right to " incur the risk and danger of producing the mischief, and having done " so is justly responsible for it; he cannot reasonably complain that the " Law did not give him notice of the penalty annexed to the offence, or " that he did not wilfully offend, for the Law may justly, after due noti- " fication, doom such an offender to the penalties inflicted on those who " accomplish their purposes by more certain or direct means; the safety " of society is inconsistent with any distinction in this respect, and the " offender in truth acted wilfully, in wilfully incurring the risk and " danger of causing the injurious result."

107. The following is offered as an illustration—" Let it be sup- " posed that A was wilfully to mutilate the person of B, not intending " to kill him, but only to injure him from a motive of revenge. Suppose " also that he did this, knowing that death, though not a certain result, " was yet likely to result from what he did, and that in fact death did " result, it cannot we presume be doubted, that the legal penalty ought " to be just the same as if A had directly intended to kill." p. 25.

* " In speaking of certainty, moral certainty is to be understood; there is in truth no perfectly " certain connexion between an act and its consequences; an accidental circumstance may save an " intended victim from the stab of the most expert assassin."

108. The English Commissioners remark upon their definition of the term "wilful," (and the remark is equally applicable to the definition
p 25 of the term "voluntary" in the Indian Code) that "although an act be "wilful, its criminality must depend on the definition of the particular "crime which may make the wilful doing of the act criminal either absolutely or subject to qualifications or exceptions." Applying this remark they say—"A party may put life itself in peril and yet "be wholly innocent, whilst another who incurred merely the "same degree of peril would be highly criminal. A Surgeon may "most innocently put the life of a patient in great peril in order "to avoid a still greater danger; a party may innocently shoot at a "tiger about to inflict deadly injury on some other person, although at "the risk of shooting him whom he wished to save; a person who incurred precisely the same degree of risk and peril of life, but who incurred "it either with a positive evil intention, or wantonly without justification "or excuse would act criminally."

109. It is to be observed that the two cases here stated by way of illustration are the same as are given for the same purpose in the Note of the Indian Law Commissioners, quoted above.

110. Sir R. Comyn notices as an objection to a variety of Clauses, "that the commission or non-commission of an offence is made too "much to depend upon what may be passing in the mind of the party "offending at the time of his committing the act laid to his charge."

111. Amongst other exceptions in this Chapter, he remarks that by Clause 62 "the party's *belief in good faith* that he is commanded "by law to do an act exempts him from criminal liability; and in Clause "63 the exemption arises from a man's exercising a power given him by "law; and *acting to the best of his judgment exerted in good faith.* "So a child above seven and under twelve cannot be guilty of an offence "unless he shall have attained sufficient maturity of understanding to "judge of the nature and consequences of his conduct on that occasion." "Again by Clause 68 a party will not be within the Code who commits an "offence under intoxication from a substance, of the *intoxicating quality* "*of which he may be ignorant.* In all these cases a most perplexing "question must be left to the Court, relative to the state of mind of the "party charged with the offence. In the first case, did he *in good* "*faith believe* he was commanded by Law? In the second case, did he "exert *the best of his judgment in good faith?* In the third, had the "child attained sufficient maturity, &c. ? In the fourth, did the party "*know* the intoxicating nature of the means of his intoxication?"

112. "In these and other instances," he observes, "the mistake "seems to be in making the question of crime or no crime, depend upon the "want of good faith, &c. so as to throw upon the prosecutor the burthen "of averring and proving the absence of good faith or misconception." After making these remarks, Sir R. Comyn himself anticipates the answer to them by suggesting that, "the Code of procedure may perhaps remove "part of this difficulty by simply requiring averment and proof of the "supposed criminal act, and leaving the party accused to satisfy the "Court that he acted from such motives or impressions as according to "the penal Code, may negative his being guilty at all."

113. Similar objections are made by Mr. Norton and others, who appear to forget that the exceptions in this Chapter, in cases which come to trial, are to be alleged in defence, and proved by sufficient evidence. The detailed rules which may be necessary for governing the procedure of the Courts in trying such defences belong to the Code of procedure. It is to be presumed that they will be so framed that it will not serve a person accused of having done something which is an offence by this Code, merely to allege that he did it "in good faith, believing "himself to be commanded by Law to do it" according to Clause 62, or that he did it "in the exercise, to the best of his judgment exerted in "good faith, of a power given to him by Law" according to Clause 63, in either case no doubt he will be required to prove that his conduct was such as to lead fairly to the inference that he acted in good faith as alleged. It is true that he cannot prove directly what was in his mind, but he may be able to prove facts by which this may be sufficiently manifested.

114. Sir R. Comyn objects that "to permit a person who has "committed an injury to set up his *private intentions* as defence or "excuse, and to allege that he did the injury from *virtuous motives* or "from a wrongful impression of the Law or the fact, would frequently "produce a defect in justice, and allow offenders to escape." We do not find that it is permitted to any person to set up his private intentions, or to allege virtuous motives, simply, as defence or excuse under a criminal charge. We hold with the English Criminal Law Commissioners, that "to allow any man to substitute for Law his own notions of right would "be in effect to subvert the Law. To investigate the real motive in "each case would be impracticable, and even if that could be "done a man's private opinion could not possibly be allowed to "weigh against the authority of the Law." But no such thing is allowed by the two Clauses above mentioned in which good faith is recognized to a certain extent as a ground of defence. Under both there

must be a bonâ fide intention *to advance the Law*, manifested by the circumstances attending the act which is the subject of charge; and the party accused cannot allege generally that he had a good motive, but must allege specially that he believed in good faith that he was bound by Law to do as he did, or that being empowered by Law to act in the matter, he had acted to the best of his judgment exerted in good faith. To satisfy the Court of his good faith, he must shew at least that he acted advisedly, and that he had reasonable ground primâ facie for believing that he ought to do what he did.

115. Clause 62 has been generally construed, as it is construed by Sir R. Comyn, to mean that a person who has done a thing that is generally an offence shall be excused if he can prove to the satisfaction of the Court that he acted " from a wrongful impression of the Law or " of the fact," causing him in good faith to believe that he was commanded by Law so to act. Ignorance or mistake of *facts* is an excuse under the Law of England; but this Clause, in the extensive construction given to it, is considered to violate the maxim common to both English and Roman Law, " ignorantia juris neminem excusat," and great objection is made to it on that ground.

116. We feel satisfied that if the authors of the Code had intended to infringe a principle so generally established they would not have done so sub silentio, but would have drawn attention to it particularly in the Note upon the Chapter. But while in that Note they carefully explain and vindicate some of the exceptions proposed, " the meaning and ground of which" they think " may not be obvious at first sight," they pass over the Clause in question as one of those " which appear to require "no explanation or defence." Although the words admit of a greater latitude of construction, we are assured that no more was meant than to excuse a person who has done what by Law is an offence, under a misconception of facts leading him to believe in good faith that he was commanded by Law to do it. This restriction being understood, the objections that have been made to the Clause are obviated. To make it perfectly clear, we would suggest that the following proviso be subjoined to the Clause—" Provided that this exception shall not extend to any " person who by reason of a misconception of Law, and not by reason of " a misconception of fact, believes himself to be commanded by Law to " do any thing."

Note B.

117. Clause 64 declares in conformity with the spirit of Article 3, Section 2, Chapter 1, of the Digest of the English Criminal Law, that nothing is an offence which is done by a child under seven years of age.

In Clause 65, the same is declared in respect of " a child above seven " years of age and under twelve who has not attained sufficient maturity " of understanding to judge of the nature and consequence of his con- " duct on that occasion." It would seem from this that *maturity of understanding is to be presumed* in the case of such a child unless the negative be proved on the defence. By the English Law, in the case of a child from seven to fourteen years of age, *incapacity to commit a crime is to be presumed* until the contrary be proved. After fourteen years *capacity* is to be presumed until the contrary be proved. With reference to the precocity of children in the East, the rule of the Indian Code which fixes the age of twelve as the period after which the plea of immaturity of understanding shall not be allowed, appears to be proper.

Digest, Chapter 1, Sec. 2, Art. 4.

Art. 5.

118. By Clause 67 " nothing is an offence which a person does in " consequence of being mad or delirious at the time of doing it;" and by Clause 68 " nothing is an offence which a person does in consequence " of being, at the time of doing it, in a state of intoxication, provided " that either the substance which intoxicated him was administered to " him without his knowledge or against his will, or that he was ignorant " that it possessed any intoxicating quality." Mr. A. D. Campbell observes that delirium may be produced voluntarily by narcotic drugs; he proposes therefore to omit " delirious" in Clause 67, and to alter Clause 68 by omitting the words after " state" and substituting " of " involuntary delirium or involuntary intoxication."

119. We apprehend that the word " delirious" is meant to distinguish the condition of a person labouring under a *transient* alienation of mind through the influence of some *unseen* cause, from that of one who is afflicted with *permanent* insanity, that is to say who is " mad," and that the delirium alluded to by Mr. Campbell arising *evidently* from the use of narcotic drugs, &c. is included under the term " intoxication" in Clause 68. This arrangement appears to be etymologically correct, and at the same time in accordance with the popular sense of the terms.

120. The authors of the Code have clearly explained the meaning and the ground of the rules laid down in Clause 69 and in the three following Clauses. The general rule is, that " nothing ought to be an " offence by reason of any harm (in respect of either person or property) " which it may cause to any person of ripe age who, undeceived, has " given a free and intelligent consent to suffer that harm or to take the " risk of that harm. The restrictions by which the rule is limited affect " only cases where human life is concerned " The general rule is contained in Clause 69, but this excludes acts either intended to cause

Note B p 15.

death, or known to be likely to cause death. The three following Clauses provide for cases where human life is concerned. Clause 70 justifies the causing of any harm even to death, when the person who caused it, did not mean to cause death, but knew that he was likely to cause death, by an act done in good faith for the benefit of the party suffering, with his consent, express or implied, as for example by a dangerous surgical operation. We have already noticed this Clause, and expressed our opinion that it is fully vindicated by the reasons assigned by the Commissioners. Further, Clause 72 justifies, under certain restrictions, death or other harm resulting from acts done likewise in good faith for the benefit of a person, *without* his consent, when he is incapable of signifying or giving consent, as, for example, trepanning a person insensible from a fall. Again, Clause 71 justifies under similar restrictions the acts of guardians done in good faith for the benefit of their wards, notwithstanding any harm even to death arising therefrom.

121. Sir J. Awdry approves of the principles upon which these provisions are founded. He says, " a sound line seems to be drawn as " to trusting individuals with their own persons and properties, and in " certain cases with those of others. I agree no less to the exception " founded on the sanctity of human life." Sir R. Comyn on the other hand objects to Clause 69 as an instance in which the Code treats offences which are really outrages on society as merely offences to individuals. He says, " Clause 69 appears to proceed upon the maxim, volenti non fit " injuria, and it might be an answer to a civil action by an injured " person that the injury was inflicted by his own consent. But the public " are surely interested in the preservation of the limbs as well as the " lives of the Queen's subjects; and if such a state of society can be " imagined as that in which one man may allow another to inflict upon " him any bodily injury short of death, it would well become the legis- " lator to step in and save persons from the consequences of their own " free and intelligent consent. In a country thoroughly civilized, a Law " such as is indicated by Clause 69 would in all probability be a dead " letter; but in India, where so much self-infliction and voluntary torture " are resorted to, it seems necessary to protect men from themselves, " rather than offer impunity to those who are assisting in their sufferings." These objections we think are of little weight against the reasons of the Commissioners.

122. Mr. Norton says, " Clauses 69 to 73 are several of them " adapted to cases the very recital of which in the illustrations is " calculated to excite ridicule, and yet they exonerate others falling " within such exceptive Clauses, which I imagine no one would wish

" so to be." He suggests that, " they may be found to authorize vio-
" lations of the peace in fighting, surgical operations of the most danger-
" ous quality by the most unqualified and ignorant quacks, selling for
" purposes of prostitution, killing to prevent ' mischief' under some
" circumstances, and any violence short of killing to prevent ' mischief'
" of any sort." The last two instances are obviously not in point with reference to the Clauses here in question. The first instance we imagine refers to the illustration (*c*) under Clause 69; but the exception of acts known to be likely to cause death would exclude dangerous fighting even with the consent required by the text, such as pugilistic prize fighting, and in a similar contest arising out of a sudden quarrel between two parties involving a breach of the peace, consent could hardly be implied. Whether an affray should be made an offence, independently of consequences, is a question to be considered in another place.

123. The second instance appears to refer to the illustrations of Clauses 70 and 72, in which operations performed by surgeons are given as examples. Under the former of these Clauses we apprehend that " an unqualified and ignorant quack" could hardly be excused, for it is not to be conceived that such a one could obtain the free and intelligent consent of any person to his performing upon him an operation dangerous to life, but by misrepresentation; and such a one could hardly satisfy a Court of Justice that he had undertaken the operation in good faith under Clause 72, for good faith must surely be construed here to mean, a conscientious belief that he had skill to perform the operation and by it to benefit the party, while the supposition is that he was unskilled and ignorant. With respect to the instance of selling for prostitution, whether such a proceeding should be declared a substantive offence, is a question which will be considered in its proper place. If it be made penal it will be necessary to provide that the exception in Clause 71 shall not extend to it.

124 With reference to the Articles providing that the exceptions in Clauses 71 and 72 shall not extend to rape, &c. Mr. W. Hudleston and Mr. A. D. Campbell make strong observations upon the allusion to such acts " as within a rule respecting acts done in good faith
" for the benefit of a child or lunatic." The explanation of the Commissioners is that, " even parents have been known to deliver their child-
" ren up to slavery in a foreign country, to inflict the most cruel mutila-
" tions on their male children, to sacrifice the chastity of their female
" children, and to do all this, declaring, and perhaps with truth, that their
" object was something which they considered as advantageous to the
" children. We have therefore, (they say) not thought it sufficient to

" require that on such occasions the guardians should act in good faith for " the benefit of their ward." The case given as an illustration *(f)*, is a person abetting a rape on his daughter, intending in good faith her pecuniary benefit.

125. We regret that in the present state of moral feeling among large classes of the people of India we cannot regard this as a case out of all probability. We fear that parents in poor circumstances are too often to be found ready " to sacrifice the chastity of their female children" under circumstances very likely to involve a rape, in a belief that they will be benefitted by the connection thus formed with persons able to provide for them. It seems to be proper therefore to guard the exception from abuse in this respect.

126. There is a difference between Clause 69 and Clause 70, in that the latter speaks of " any person" " who has given a free and intelligent " consent," whereas in the former it is " any person above 12 years of age" who has given such consent. We have seen that in describing these Clauses generally, the phrase used by the Commissioners is " a person " of ripe age," which phrase is also used in describing Clause 70 particularly—" we propose therefore that it shall be no offence to do even " what the doer knows to be likely to cause death, if the sufferer, being " of ripe age, has, undeceived, given a free and intelligent consent to " stand the risk," &c. By Clause 31 " the words intelligent consent, " denote a consent given by a person who is not from *youth*, &c. unable " to understand the nature and consequences of that to which he gives " his consent." In the case supposed in the illustration to Clause 70, if the child is under 12 years of age, and has a guardian, a surgeon ought not, we conceive, to act without the consent of the guardian according to Clause 71. If the child has not a guardian, but is, although under 12 years of age, capable of giving an intelligent consent, the surgeon would be justified under Clause 70 in acting upon that consent, and under Clause 72 even without that consent.

127. We may here notice a remark of Mr. A. D. Campbell— " With reference to the very early age at which females reach the age " of puberty in India, it appears to me a mistake throughout the Code to " confound a person under 12 years of age with incapacitated infancy." From the observations we have just made it will be apparent that this remark is not strictly correct. We shall revert to the point when we come to consider the Clause 298 regarding " culpable homicide by " consent," as applied to a case of Suttee where the widow is under 12, which Mr. Campbell had particularly in view.

128. Clause 73 has been objected to as superfluous. Sir H. Seton asks, whether the subject is not one which "might be left to the discre- " tion of those by whom the Law is to be administered? and whether this " Clause affords any other security?" The answer is to be found in the Note of the Commissioners—"Clause 73 is intended to provide for those " cases which, though from the imperfections of language they fall within " the letter of the penal Law, are yet not within its spirit, and are all " over the world considered by the public, and for the most part dealt " with by the tribunals, as innocent." After specifying instances, they say, " that these acts ought not to be treated as crimes is evident, and " we think it far better expressly to except them from the penal Clauses " of the Code, than to leave it to the Judges to except them in practice. " For if the Code is silent on the subject the Judges can except these cases " only by resorting to one of two practices which we consider most per- " nicious, by making Law, or by wresting the language of the Law from " its plain meaning." p 18.

129. Some of the objections to this Clause seem to arise from misconception. Thus Sir R. Comyn observes upon it that "the criminality " of doing 'harm' depends upon whether the person harmed be of ordi- " nary sense or temper, and likely to complaim of such harm," and his comment is that " it seems straining the Criminal Law to suppose the " consumption of the time of the Court in ascertaining the sense and " temper of the party." Now all this is a mistake. There could be no question of the sense and temper of the person harmed under Clause 73. The only question there could be, is, how would men of ordinary sense and temper regard the harm of which he complained? was it so slight that no person of ordinary sense or temper would complain of it?

130. We come now to the provisions regarding the right of private defence, of which the Commissioners speak with great diffidence as the part of the Code the least satisfactory to themselves, at the same time observing that they are " inclined to think it must always be one of the " least exact parts of every system of Criminal Law." They propose to except from the operation of the penal Clauses of the Code large classes of acts done in good faith for the purpose of repelling unlawful aggressions. Of the definitions they have given of the limits of private defence, they observe as follows: " It may be thought that we have allowed too " great a latitude to the exercise of this right; and we are ourselves of " opinion, that if we had been framing laws for a bold and high spirited " people, accustomed to take the law into their own hand, and to go " beyond the line of moderation in repelling injury, it would have been " fit to provide additional restrictions. In this country the danger is Clauses 74 to 84.

"on the other side. The people are too little disposed to help them-
"selves. The patience with which they submit to the cruel depreda-
"tions of gang robbers and to trespass and mischief committed in the
"most outrageous manner by bands of ruffians, is one of the most
"remarkable, and at the same time, one of the most discouraging
"symptoms which the state of society in India presents to us. Un-
"der these circumstances we are desirous rather to rouse and
"encourage a manly spirit among the people than to multiply res-
"trictions on the exercise of the right of self-defence. We are of opini-
"on that all the evil which is likely to arise from the abuse of that right
"is far less serious than the evil which would arise from the execution
"of one person for overstepping what might appear to the Courts to be
"the exact line of moderation in resisting a body of Dacoits."

131. Sir J. Awdry says, "I agree with the admission of the Com-
"missioners that the line drawn as to the right of private defence is not
"satisfactory, as well as that it is probably the least satisfactory part of
"most Codes. I cannot suggest a better line. The difficulty is inherent.
"A nicely graduated scale of urgency is impossible, because it depends
"on a combination of so many circumstances wherein those which are
"higher in their kind may exist in a lower degree, and because the rule
"is to be applied by unlearned men, under circumstances likely to de-
"prive them of self-possession. I do not see that the Commissioners have
"erred from the line of moral right and wrong, and this is the true
"guide—men cannot in general act in such cases from the knowledge of
"their rights, but from the impulse of the moment acting on dispositions
"ready or not ready to place others' safety in fair competition with their
"own—upon this footing therefore, not on that of strict knowledge of the
"law, must their responsibilities stand, though of course it is desirable
"to simplify the law, so as to obtain the largest possible amount of
"knowledge."

132. Mr. Norton on the other hand says, "As to those 'General
"Exceptions' which exclude from criminality certain acts done in *private*
"*defence*, a host of cases, as it appears to me, might be suggested falling
"within the text which neither ought, nor perhaps were intended, to
"be included, and as many more acts disallowed, which are justifiable!
"Such terms as right of defending body or property against 'mischief'
"or 'criminal trespass' are not indeed easy to be appreciated, and the
"whole Clause 75 is, with reference to the vast variety of cases which
"may possibly be pointed at, to me absolutely unintelligible. I know
"not how to make Clause 76 square with the restrictions of Clause 75."
He adds, "It would be too tedious a task to point out the doubts, and

" difficulties, and incongruities, which arise to my mind in the perusal of " the various vague and general expressions throughout this Chapter."

133. Mr. W. Hudleston, one of the Judges of the Sudder Court at Madras, " thinks that the general principle of these rules respecting the " right of private defence contrasts disadvantageously with the plain prac- " tical good sense of the Law of England on this subject." He views the several Clauses as open to the objection that they would tend " to deter " from exertion for the protection of person and property." It appears to him also that " the conditions enumerated are such as cannot be " supposed to enter into the contemplation of the party assaulted." And he " regards the whole as a piece of legislation that savors of the " closet, and could not have emanated from practical knowledge and " experience."

134. Mr. A. D. Campbell, another Judge of the Sudder Court at Madras, and several other Judges of that Presidency, concur with Mr. Hudleston in thinking that the subsequent qualifications of the right declared to be inherent in every person by Clause 74, are " calculated " to paralize those exertions in defence of their persons and property " which the Government has sought to encourage among the natives of " this country."

135. Mr. Giberne, a Judge of the Sudder Court at Bombay, makes observations to the same effect.

136. It will be seen from the quotation given above, that the Commissioners were fully alive to the danger of discouraging self-exertion on the part of the people by restrictions on the exercise of the right of self-defence, and apprehended that they might be thought to have gone too far the other way, and to have allowed too great latitude to it. And so we find Officers of the Upper Provinces of the Bengal Presidency making this very objection. Thus Mr. Heyland anticipates that under colour of exercising the right of defence against mischief or criminal trespass, there will be endless affrays and breaches of the peace. " The " evil that is thus likely to arise," he observes, " is but too evident, and " there is doubtless a wide difference between this species of aggression " and that by a band of Dacoits, and however little disposed the natives " of this country may be to oppose the latter, they are by no means " backward in opposing their neighbours in an act of trespass, or on any " slight provocation, and are only too ready to make use of their swords " and clubs on those occasions." Again, Mr. G. W. Bacon observes, that " nothing is more common than the defence that the deceased was sup-

" posed to be a thief, when murdered in cool blood; and when really " suspected, the first thing done towards his apprehension is usually " the infliction of a sword cut. Whatever may be the case in Bengal, " the natives of these Provinces (North-Western Provinces) are ready " enough to slay, right or wrong, and require no further encouragement.

137. Before proceeding to notice the particular criticisms which we find in the papers referred to us upon the provisions of the Code on this subject, we shall shortly state for the purpose of comparison the rules set out in the Digest of the English Criminal Law Commissioners, which it is the more necessary to advert to, since " the plain practical good sense of the Law of England" is supposed to rebuke the theoretical contrivance which is attributed to the framers of the Code, in this, as in other parts of it.

Chapter XV. Sec 2. Art 20 138. First then with respect to *Homicide*, it is laid down in the Digest that it is justifiable, 1stly, for the prevention of any felony, that is to say (Chapter I, Section I.) any offence punishable with death or transportation, against the *person*, *habitation*, or *property*, of the person killing, or of *any other person*; 2ndly, for the defence of one's own *person* against *violence*, under reasonable *apprehension* of *immediate death* from the assailant; 3rdly, in repelling force by force in defence of one's own person, *using no more violence than is necessary*; 4thly, in defence of *moveable property*, repelling force by force, and *using no more violence than is necessary*; or under *fear of death* from the assailant; 5thly, in defence of *house or land*, resisting a person endeavoring by force to enter, using *no more violence than is necessary*; or under *fear of death*; 6thly, in *removing* from house or land a person who has *no right to be there*, using *no more violence than is necessary*; or, under *fear of death*. And such justification extends to every person aiding or assisting another in the defence of his person or property.

Art 22. Art. 23. Art 24. Art 25. Art 26. Sec 5, Art. 51.

Clause 74. 139. By the Code every person has the right to defend *his own body*, and *the body of every other person* against *every assault*; and *his own property*, and *the property of every other person* against *theft*, *robbery*, *mischief*, or criminal trespass.

Clause 76. 140. Homicide, or " the voluntary causing of death," is justifiable in defence of *the body*, as above, against an assault likely to cause *death* (1) or *grievous hurt* (2); or with intent to commit rape (3), or an *unnatural offence* (4); or for the purpose of *kidnapping* (5), or of *confining wrongfully* (6): and in defence of *property*, against *robbery* (1), *house-breaking by night* (2), *mischief by fire* on any building, tent or vessel,

Clause 79.

used as a *human dwelling* (3); and against *theft*, *mischief*, or *house trespass*, *under* circumstances causing *apprehension of death or grievous hurt*. (4).

141. In cases not of any of the descriptions above enumerated, the right of self-defence extends to the causing of any harm other than death, in repelling assaults upon the person, or offences against property, subject to the general condition of inflicting *no more harm than it is necessary to inflict for the purpose of defence.* Clause 77 Clause 75.

142. The Digest does not expressly declare that every person has the right to defend his person and property, and for this end to repel force by force, and that where homicide may not under the circumstances be justifiable, any lesser degree of bodily harm may be justifiable, if no more violence was used than was necessary for the purpose of defence, but this appears to be implied in Article 44, Section 5, of Chapter XV. in which it is laid down that "where violence is permitted to be used "in the defence of person or property, any excess beyond that which is "necessary and unavoidable is within the meaning of the last preceding "Article," which defines the offence of "Battery."

143. Comparing thus the provisions of the Code with the rules contained in the Digest of the English Criminal Law framed by Her Majesty's Commissioners, it is not easy to discover the contrast alluded to by Mr. Hudleston, and one is at a loss to conceive what Mr. Norton meant in his observation that "such terms as right of defending body or "property against mischief, or criminal trespass, are not easily appre-"ciated." The Code does not speak of defending the *body* against mischief or criminal trespass, but it does speak of defending *property* against such offences by resisting even to the death, if necessary; and so does the Law of England.

144. Coming now to the criticisms upon particular provisions, we shall notice first some observations of Mr. J. F. Thomas upon the declaration contained in Clause 75, that "the right of private defence in "no case extends to the inflicting of more harm than it is necessary to "inflict for the purpose of defence." Mr. Thomas says, "This I "consider too indefinite, and it is not aided by the illustration (*b*)— "that A, a powerful man well armed, defends his property by killing an "unarmed boy. The illustration shews, not merely that A inflicted "'more harm,' it may be but little, or by some degrees, than was "necessary, but such as was obviously, and wantonly unnecessary, and "the definition itself should I think be confined to this class of cases.

" At present there is too much uncertainty in the Law. Judges must " differ greatly when they have to determine the point, that no more " harm than necessary was done. I would make the line broader, " and stronger; and would suggest that the Clause should run in these " or similar terms—'The right of private defence, in no case extends to " the inflicting of harm manifestly and clearly unnecessary to inflict for " the purpose of defence.' The illustration in the Code will then stand."

145. Mr. Giberne apprehends that this provision " will occasion " much doubt and difficulty, the opinion of the defender being acted " upon at the moment of danger with all his feelings enlisted in favor of " extreme measures, whereas the Judge quietly contemplating in his " Court the probable and distant danger, will naturally hold a very " different opinion, and the consequence will be, that people will be " discouraged from defending themselves and property from fear of the " consequences."

146. We have shewn that words substantially of the same import with those in question are used for the same purpose in the Digest of the English Law Commissioners, and we may take it upon the authority of the Commissioners that they are strictly in accordance with the present Law. We are not aware that it has been found in practice that they present any greater difficulty than is inherent in the nature of the case. The necessity for the degree of force used is a matter to be judged of " from the manner of the attack, the means used in the attack, or some " other manifestation of the criminal purpose." We doubt whether a stricter definition could be made without risking the consequence apprehended by Mr. Giberne from the present one.

147. Mr. Norton to explain his remark that he " knows not how to make Clause 76 square with the restrictions of Clause 75," observes that " taking the text of the two together, part of it may be read thus: " a female may defend herself against an assault, provided she ascertains " that the assault is with a view to rape, and provided she acts under " the restrictions of Clause 75, one of which is that she must not inflict " more harm than is necessary." We really cannot perceive any difficulty in this case, and we think that Mr. Norton would hardly be able to shew that the female would be in a more unfavorable position for defending herself in a Court of Justice, which it is to be remembered is the point in all the exceptions, under the Clause in question, than under the English Law, as it is set forth in Article 20, coupled with Article 21, Section 2, Chapter XV. of the Digest, which contain the provisions that apply to the case supposed Under either law, the

female being accused, let us say, of homicide, would confess the fact, but would justify it on the ground that she slew the man to save herself from violation, being unable to do so by any other means. Under either law she would have to give proof of circumstances evidencing the intent of the man, and the necessity of her act to prevent him from accomplishing his purpose.

148. We take it that Article 20, above-mentioned, which justifies homicide for the prevention of any *felony*, includes all the cases in Clause 76 of the Code, except the sixth, an assault with the intention of wrongfully confining any person, and this last we apprehend is covered by Article 23.

149. Referring to the case last mentioned under Clause 76, in connection with the first Article of Clause 75, Mr. Norton observes, that "a man may defend himself against an assault provided he ascertains "that the assault is with the intention of confining, and is aware that "the apprehended confinement is an offence punishable by more than a "year's imprisonment, and provided also, that the assailant does not "turn out to be a public servant authorized under circumstances to "confine *some* person though not the party assailed." This case is stated invidiously. Simply stated the proposed law is, that if a public servant, known to be one who is by his office competent to make arrests, shall attempt to confine a person, it may be wrongfully, that person will not be justified in resisting the attempt by force, but he will be justified in resisting by force any person not being a public servant, or not being legally competent, who shall attempt to confine him, and if from the circumstances there be reasonable cause to apprehend that the confinement is intended to be protracted, he will be justified in resisting even to death, if necessary.

Clause 75

Clause 76

150. We think, however, that there is reason in the exception that has been taken to the provision which justifies homicide in resisting an attempt at wrongful confinement likely to be continued for three days, that is to say, such a confinement as is punishable under Clause 334 with imprisonment for a term exceeding 1 year. Although it may be right to allow resistance even to death against an attempt to carry a person off to be kept a prisoner in a hill fastness, for example, where his captivity would be likely to continue for years, we cannot think it would be right to justify such an extremity to prevent a confinement which there was reason to apprehend might extend to three days, or a little more, even if it were quite certain that it could not be prevented by other means.

151 With reference to the second Article of Clause 76 and the fourth Article of Clause 79, Mr Pyne, a Judge of the Sudder Court at Bombay, observes as follows : " Were ' grievous hurt' limited to the first " seven definitions of that offence, the right of private defence against " an assault by which it might reasonably be apprehended that such " grievous hurt would take place, might be taken as a justification for " homicide, but, under the eighth designation of the offence, it is I think " allowing too great latitude to the right of private defence to suffer a " person to resist to the death from a fear of receiving an injury which " may render him unable to follow his ordinary pursuits for twenty " days ; the nature of the assault against which a person in self-defence " acts, must be taken into consideration, in extenuation or aggravation of " the homicide, and the intention of the aggressor will always be much " more clearly developed by the instrument made use of, and other " circumstances, when permanent bodily injury is contemplated, than " where the fear of the assaulted may magnify the assault, into the appre- " hension of grievous hurt. It appears to me that scarcely any assault " can be committed, wherein the assailed may not justify an act of homi- " cide under the eighth definition of the offence." We shall revert to this observation in considering the definition of grievous hurt.

Clause 314

152. Upon the 3d Article of Clause 79, Mr. T. Blanc observes that " the restriction that the building, &c. should be used as a human dwelling " appears unnecessary and injurious. If I may kill a man while attempt- " ing to rob my property from a godown or tent not used as a dwelling, " surely I ought to be allowed to do so if he attempts to destroy the " same property by fire. I might recover my property if robbed, but " not if destroyed by fire. By this rule the attempt to set fire to a stable " full of valuable horses, a warehouse, or even a public arsenal, could " not be resisted by killing the offender."

153 Mr Blanc appears to have overlooked that the definition of *robbery* in Clause 375 makes the causing or attempting to cause death, hurt, or unlawful restraint to any person, or fear of death, &c. a necessary ingredient of the offence. But we are on the whole inclined to concur in the opinion that the restriction to a human dwelling in the case of mischief by fire in defining the right of defence in Clause 79 is unadvisable There is no such reserve with respect to house-breaking by night, which may be committed in a place for the custody of property as well as in a human dwelling.

Clause 424, which refers to Clause 420

154. Mr J. F. Thomas upon the same Article suggests that a distinction should be drawn between frail huts constructed of boughs, &c

and permanent dwellings. This is a point which will fall to be considered in examining the Chapter on offences against property.

155. Upon Clause 81 Mr. T. Blane observes that the expression in the second para. " till the offender has effected his retreat" is very indefinite. The whole Clause, with exception of the 1st para., he thinks is too much restricted. He remarks that the natives of this country seldom recover from the panic caused by an attack, or think of resistance, till a robbery has been completed, they cannot indeed assemble in sufficient numbers soon enough; if therefore a village has been attacked and robbed by a gang who have effected their retreat with the property to a neighbouring jungle, the villagers ought not to be precluded from attempting its recovery and the seizure of the robbers, even at the risk of killing any of them. Again he observes, that under this Clause, if a man has broken into a house and carried off property only just outside the wall or door, the owner may not slay him in attempting to recover the property.

156. Mr. G. Casamajor offers remarks to the same effect. He and Mr. A. Elphinstone suggest that the privilege of this Clause should operate till the offender is taken and delivered to an Officer of Justice.

157. The rule of the Law of England is that " as homicide com- " mitted in the prevention of forcible and atrocious crimes is justifiable " only upon the plea of necessity, it cannot be justified unless the " necessity continue to the time when the party is killed. Thus though " the person upon whom a felonious attack is first made be not obliged " to retreat, but may pursue the felon till he finds himself out of danger; " yet if the felon be killed after he has been properly secured, and when " the apprehension of danger has ceased, such killing will be murder; " though perhaps, if the blood were still hot from the contest or pursuit, " it might be held to be only manslaughter, on account of the high " provocation."

Russell 1.—552.
Art. 21, Sec. 2, Chap XV. of Digest

158. We think with Mr. Blane that the 2d para. of Clause 81 is not sufficiently definite. We are not sure of the meaning intended by the expression " till the offender has effected his retreat " with the property." We know not certainly when he is to be considered as having effected his retreat; probably it is when he has once got clear off, having escaped *immediate* pursuit, or pursuit not having been made; but the meaning should be made certain by an explanation or illustration. We presume that the protection of parties pursuing robbers, &c. for the recovery of property which they have

succeeded in carrying off, or for bringing them to justice, was thought not to be within the scope of the provisions touching the right of private defence. We apprehend that under the rules which will be laid down in the Code of Procedure, parties will be protected on such occasions under Clauses 62 and 63.

Clause 82 (b)

Blackstone 4—27

159. Sir R. Comyn, speaking of Clause 82, says here misconception "is innocence." It does not appear however that in the instance given the proposed law differs from the Law of England. Blackstone specifying ignorance or mistake of fact as one of the pleas or excuses which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, gives as an illustration the case of a man, who intending to kill a thief or house-breaker in his own house, by mistake kills one of his own family; "this," he observes, "is no criminal action." "Misconception" is not *expressly* mentioned as an excuse in any of the antecedent Clauses; the reference we apprehend is to Clauses 62 and 63. The illustration appears to depend upon the latter. It is as follows: "A enters by night a house which he is legally entitled to enter. Z, in "good faith taking A for a house-breaker, attacks A. Here Z, by at-"tacking A under this misconception, commits no offence. But A has "the same right of private defence against Z which he would have if Z "were acting under no misconception."

* Mr. Tucker writes 68

160. Mr. H. C. Tucker observes that it appears inconsistent in Clause 82 to allow A to kill Z making an attempt upon his life under the influence of madness, which under Clause 67* is no offence. The right of private defence holds against any assault causing the apprehension of death, and it matters not what is the mental condition of the assailant. *This* is to be considered only with respect to *his* responsibility.

161. Exception is taken by Mr. Hudleston, Mr. A. D. Campbell, Mr. T. Blane, and others to Clause 84. Mr. Blane observes, "a person's "simple belief in good faith that circumstances are so and so, ought not "to be sufficient—there ought also to be sufficiently strong and just "grounds for his belief. An instance has been known of a person shoot-"ing his own servant who had come to his room at night mistaking him "for a robber, but he ought not to be held blameless, he ought to have "ascertained that he was a robber before he killed him." The party in such a case would have to satisfy the Court that he believed in good faith that the man was a robber, which must be taken we conceive to exclude a mere reckless conjecture or suspicion. Belief must have a foundation, and that must be shewn. The reference we have made above to the English Law in respect to "misconception," is in point here.

162. We have now finished our review of the provisions in the Chapter of "General Exceptions" which appeared to call for remark. We proceed to notice some omissions, the reasons of which are given in the Note to the Chapter.

163. By Article 30, Section 2, Chapter XV. of the Digest of the English Criminal Law, it is laid down that "homicide is justifiable "whensoever a man is involuntarily placed in such a situation, that he is "under the necessity of exposing another person to certain death in order "to save his own life." In a note to this Article in the 4th Report of the Commissioners it is said, "the illustration commonly applied "in the text books to this rule is the case supposed by Lord Bacon, "(Maxims of the Law, Reg. 5.) where two persons being wrecked and "getting on the same plank which is insufficient to save them both, one "thrusts the other from it, whereby he is drowned."

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v. Blackstone, 4.—186.

164. Again by Article 6, Section 2, Chapter I. of the Digest it is declared that, "Duress inducing just and well grounded fear of death, or "of grievous bodily harm, shall be sufficient to excuse a person acting "under such duress from penal consequences, except in case of treason "and homicide."

165. There are no corresponding rules in the Indian Code. The Commissioners say, "We long considered whether it would be advis- "able to except from the operation of the penal Clauses of the Code, acts "committed in good faith from the desire of self-preservation, and we "have determined not to except them."

Note B page 19.

166. They observe that, "it would be mere useless cruelty to hang "a man for voluntarily causing the death of others by jumping from a "sinking ship into an overloaded boat. The suffering caused by the "punishment is considered by itself an evil, and ought to be inflicted "only for the sake of some preponderating good. But no preponderat- "ing good, indeed no good whatever, would be obtained by hanging a "man for such an act." Again, "a gang of dacoits, finding a house "strongly secured, seize a smith, and by torture and threats of death "induce him to take his tools and to force the door for them. Here it "appears to us that to punish the smith as a house-breaker would be to "inflict gratuitous pain. We cannot trust to the deterring effect of "such punishment." They then say, "If all cases in which acts fall- "ing under the definition of offences are done from the desire of self- "preservation were as clear as the above, we should without hesitation "propose to exempt this class of acts from punishment. But in both

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" these cases, the person in danger is supposed to have been brought " into danger, without the smallest fault on his own part, by mere " accident, or by the depravity of others." On the other hand they remark that, " nothing is more usual than for pirates, gang robbers, " and rioters, to excuse their crimes by declaring that they were in " dread of their associates and could not act otherwise. Nor is it by " any means improbable that this may often be true. Nay it is not " improbable that crews of pirates and gangs of robbers may have com- " mitted crimes which every one among them was unwilling to commit, " under the influence of mutual fear." " But we think it clear," they " say, " that this circumstance ought not to exempt them from the full " severity of the law," and the reasons they give for this opinion are that, " though we cannot count on the fear which a man may entertain " of being brought to the gallows at some distant time as sufficient to " overcome the fear of instant death, yet the fear of remote punishment " may often overcome the motives which induce a man to league himself " with lawless companions, in whose society no person who shrinks from " any atrocity that they may command is sure of his life."

In fine they say, " We should think it in the highest degree pernici- " ous to enact that no act done under the fear even of instant death should " be an offence. It would a fortiori be absurd to enact that no act under " the fear of any other evil should be an offence. There are as we have " said cases in which it would be useless cruelty to punish acts done " under the fear of death, or even of evils less than death. But it ap- " pears to us impossible precisely to define those cases. We have there- " fore left them to the Government, which in the exercise of its " clemency will doubtless be guided in a great measure by the advice of " the Court."

167. We think that a distinction may be drawn between cases in which a man does a thing which is an offence by Law, spontaneously, to save his own life, and cases in which he does such a thing, from what is called Duress, that is from the compulsion of others to save his life threatened by them.

168. With respect to the former, we agree with the authors of the Code that it is impossible to define precisely those cases in which it may be proper to excuse the parties, and that it is expedient to leave them to the discretion of the Government.

169. With respect to the latter, it seems to us that the following would be a safe definition with the explanation annexed:

" Nothing is an offence, except under Clause 294, which is done " by a person who is compelled to do it by threats, which may reason- " ably cause the apprehension that instant death to that person will " otherwise be the consequence, the act being done in the presence of " the person using the threat, and the threat being continued to the " time of doing it, provided the party doing the act did not voluntarily " place himself in the situation by which he became subject to such " constraint."

Explanation. " A person who shall have voluntarily joined a gang " of dacoits, or a crew of pirates, or the like, knowing their character, " will not be entitled to the benefit of this exception, on the ground of " his having been compelled by his associates to do any thing that is an " offence by law.

" A person who shall have embarked ignorantly in a piratical vessel, " being compelled by the crew by threat of instant death to join in an " act of piracy, will be entitled to the benefit of the exception.

" So also a person seized by a gang of dacoits and forced by threat " of instant death to do a thing which is an offence by law, for example, " a smith compelled to take his tools and to force the door of a house for " the dacoits to enter and plunder it."

170. By the English Law according to the Digest, Duress cannot be pleaded in excuse of treason or homicide; except, in cases of treason, the charge be for " levying war against the king," or " adhering to the king's enemies," or " supplying money, &c. to be used in furtherance of any treasonable design or purpose," when it may be pleaded under certain conditions. Art 7 Art. 8.

171. The Clause we have drawn relating to Duress likewise excludes the plea in case of homicide, and it is expressed so as in effect to adopt the conditions above alluded to, not only in the case of persons compelled to join in waging war against the Government, &c. but generally, as we think they ought to be of general application.

172 We observe that Duress is allowed as an excuse by the Code framed by Mr. Livingstone in case of the party having been threatened with loss of life or limb, or forced by actual violence, and the English Law allows it when the party was constrained by the fear of grievous bodily hurt as well as fear of death; we have thought it proper however to limit the excuse to cases in which the party acted under threat of instant death.

Chap 1. Sec 2, Art 9.

173. It is laid down in the Digest of the English Criminal Law that, "a married woman charged with the commission of any criminal act "shall, in case her husband shall be present at the time of the commis- "sion of such act, be presumed to have acted under his coercion, and "shall be entitled to an acquittal, unless it appear that she did not "so act. Provided that no such presumption shall be made in case "of any charge of treason or homicide." By Mr. Livingstone's Code, "a married woman committing an offence by command or persuasion of "her husband shall suffer no greater punishment than simple imprison- "ment for one half of the term to which she would have been sentenced "if she had committed the offence without such command or persuasion."

Art. 10.

174. There is no provision in favor of the wife under such circumstances in the Code under review. The point is not adverted to in the Notes; we have therefore no explanation of the reasons upon which the framers of the Code determined not to allow the plea of coercion by the husband to avail in favor of the wife, either to the extent of excusing her, or in the way of extenuation. It seems to us, considering how much the women of India are under the power of their husbands, that such a plea may more properly be allowed in this country than in England.

CHAPTER IV.

OF ABETMENT.

175. Mr J F. Thomas considers the Chapter of Abetment "a great and highly valuable improvement."

176. On the other hand, Mr. Norton says "This Chapter appears "to me to confound and perplex the English Criminal Law of Principal "and Accessories, which law I conceive to be very clear and rational."

177. Mr. W. Hudleston likewise says "I am of opinion that these "rules are less worthy of adoption than the provisions of the Law of "England."

178. The Law of England on this subject is set forth in the Digest prepared by Her Majesty's Commissioners under the head of "Criminal Agency and Participation." In the first Article it is declared that "parties to a crime are either principals in the first degree, or principals "in the second degree, or accessories before the fact." Chapter 1, Sec. 4, 7th Report, p 115.

179. "A principal in the first degree," according to Blackstone, "is he that is the actor or absolute perpetrator of the crime," "in the "second degree he who is present aiding and abetting the fact to be "done." "An accessory is he who is not the chief actor in the offence "or present at its performance, but is some way concerned therein either "before or after the fact committed." The Digest explains that not only the absolute perpetrator of a criminal act is a principal in the first degree, but also he who causes it to be done, otherwise than by a guilty agent. An accessory is defined to be one who "not being present" at the doing of a criminal act "has procured or promoted the doing of it." And it is declared that "a party shall be deemed to procure or promote the doing of a criminal act" "who shall by commandment, counsel, advice, consent, "aid, or otherwise, either directly or indirectly cause, incite, or encourage "any other offender to do such act or cause it to be done." Vol 4, p 34 and 35. Art. 2, Chapter 1, Sec 4. Art 10. Art 11.

180. It is declared in Article 14, that "Every party to a crime "within the meaning of Article 1 shall be deemed to be guilty of that "crime," and that every penal provision in respect thereof shall be applicable to all parties within the meaning of the same The effect of which,

as explained in a Note, " is to make every one liable as the doer, who is " either the actual doer, or who aids in the doing, or procures or promotes " the doing of any criminal act."

181. There is no distinction of principals in the first degree and principals in the second degree in the Indian Code. In the 3d Clause of the Chapter of General Explanations, it is laid down once for all that " Wherever the causing of a certain effect with a certain intention, or with " a knowledge of certain circumstances, is an offence, it is to be under- " stood that if more persons than one jointly cause that effect, every one " of them who has that intention, or that knowledge, commits that " offence."

Chapter 1

182. The definitions of substantive offences, construed with reference to this general explanatory Clause, take in all who actually cause or assist in causing the effect which constitutes the offence, without distinction of leaders or followers, principals or subordinate agents. We apprehend that all are included whose acts are such as to bring them within the definition of principals in the first degree in Articles 3 and 4, Section 4, Chapter I. of the Digest of the English Law, and all who as being actually present and assisting come directly within the definition of principals in the second degree in Article 7, but not such as are constructively regarded as principals in the second degree under the circumstances set forth in Article 8, though not present and not having any hand in causing the effect. The latter come under the third head in the definition of previous abetment in the Indian Code, and are made liable to the same punishment as the actual perpetrators. The effect is the same as by the English Law, but without that forced construction by which the English Law is strained for the purpose.

Clause 86.
Clause 97

Previous Abetment

183. The provisions regarding " previous abetment," in the Indian Code, besides the offenders just mentioned, appear to apply to all who, as procuring and promoting the doing of criminal acts, in any of the ways set forth in the Article of the Digest quoted above, are liable to be dealt with by the English Law as accessories before the fact.

Art 11, Sec 4, Chapter 1.

184. According to the definition in the Code previous abetment is the procuring and promoting the doing of a thing by instigation, conspiracy, or aid, or by concealment intended to facilitate the doing of the thing. The mode of abetment last mentioned is not in terms brought into the above Article in the Digest as rendering the offender liable to be dealt with as an accessory. The concealment of an intended offence by a party not consenting thereto is provided for as a misprision under the head

of offences tending to defeat justice. If the concealment was wilful with the intention of facilitating the commission of the offence, we apprehend that it would be construed into such approbation or assent as would make the offender an accessory before the fact.

Art 27, Sec. 5, Chapter 5 Russell 1, p. 29.

185. In the 8th Report of the Commissioners on the Criminal Law of England, lately published, this subject is again discussed. It is assumed to be impossible to make any distinction between accessories before the fact and principals, *as regards the degree of the offence*, and it is questioned whether there ought to be any distinction *in the mode of charging the offence*. " The main, and as it seems the only reason for charging the " procurement or participation of the offence specially," say the Commissioners, " is the giving to the party charged more accurate and circum- " stantial information as to the mode of participation intended to be " proved." It is admitted that if the distinction were of easy practical application, it would be desirable to adopt it for this reason. But it is argued that it would be attended with great practical inconvenience.

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186. After stating the difficulties, the Commissioners observe that there seem to be three modes of obviating them; " by admitting the " general charge to be sufficient, but requiring the prosecutor on applica- " tion by the accused and under the direction of the Court to supply the " accused with the names of the principals in the first degree, and such " particulars as would be necessary with a view to his defence; or second- " ly, by allowing the charge to be stated in both ways by means of differ- " ent Counts; thirdly, by allowing the charge to be made in the alterna- " tive," when it is doubtful whether the proof will show the party to have been an accessory before the fact or a principal in the second degree.

187. The authors of the Code, in framing the definitions of abetment, have made the distinction the propriety of which is here in question, and the provision in Clause 61, it seems to us will obviate the difficulties apprehended by the English Commissioners. This Clause directs that when a person is found guilty of an offence, but it is doubtful under which of certain penal provisions he is punishable, the offender shall be liable to whatever punishment is common to the penal provisions between which the doubt lies. The same result is aimed at by the suggestion which we find has been offered by Lord Denman, Lord Chief Justice of England, and other persons consulted by the Criminal Law Commissioners, namely, in the words of Lord Denman, that " when the train of " circumstances makes it perfectly clear that the accused is either prin-

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" cipal or accessory, but does not enable the Jury to see clearly whether " he is one or the other, the finding of that alternative by the Jury ought " to expose him to punishment."

188. The above observations we conceive will be found to answer the question put by Sir H. Seton, upon Clause 85, in this Chapter, "why " omit abetment simply, viz. being present at and aiding?"

189. Mr. Norton, after the remark quoted above, objectingly observes that " those who *aid* and those who *conspire* and who may *also* " be *present* and substantively *co-operate* in the act, ought to all in- " tents and purposes to be considered as principals and not abettors." We have shewn that with respect to those who are " present" and " sub- " stantively co-operate" this is just what is intended, and Mr. Norton himself remarks that " Clause 3, of the 1st Chapter enacts as much," " but " that," says he, " is not so enacted by *this* Chapter." We do not see why it should be again enacted in this Chapter, the Clause referred to being intended, as is clearly expressed, to govern the whole Code. With regard to " those who aid" and those who " conspire," though they are distinguished from the principal offenders for the sake of accuracy of definition, they are liable to be dealt with in the same manner, as we have already intimated.

190. As a specimen of Mr. Norton's criticisms we may notice his remarks upon abetment by concealment. " It may be asked," he says, " what " is ' concealing'? probably ' not disclosing' is meant—A party not dis- " closing the design of his friend or child to commit an offence is himself " criminally guilty, though he may afterwards prevent or dissuade that " very design from being effected." The inaptitude of this illustration will be obvious when on turning to the definition it is observed that concealment amounts to " abetment" only where the party *intends* or *knows* it *to be likely* that he may *thereby facilitate* the doing of the thing designed. This is the definition of what constitutes abetment: whether the abetment is criminal depends of course upon whether the thing is an offence or not.

Clause 86.

Clause 87

191. " Luckily," Mr. Norton adds, " there is no punishment award- " ed in the Code for concealing a design not carried into effect." Is it to be believed that Mr. Norton sincerely thought that this happened by chance ?

192. Again, in the very next paragraph of his Report, Mr. Norton mentions " as an example of very loose style of legislation, even in an

"illustration" "that a person is declared (Clause 87) to steal a horse "who takes him fraudulently, and if another *aids* him in that act (say "by opening the stable door and leading the horse out) he *abets* that "*theft*, but is not a *principal thief*." This is an unaccountable misrepresentation, as will appear at once from the following quotation of the illustration to which he refers. "A aids B to take a horse out of Z's "possession. Here if B took the horse fraudulently B is guilty of theft. "But if A aided B believing that B had a right to take the horse, A is "*not said to have abetted the theft* committed by B, though he has "abetted the taking of the horse." The illustration it will be perceived is the very reverse of what Mr. Norton represents it to be. His remarks are surely an example of an unhappily "loose style" of criticism.

193. Sir R. Comyn, adverting to the word "misconception" in Clause 87, refers to his remark on the same word in Clause 82, which we have already considered. Sir H. Seton, Mr. W. Hudleston, and Mr. A. D. Campbell, object to the passage in Clause 87 containing this word, as obscure. Sir H. Seton points to Clause 99 as liable to the same objection. The learned Judge doubts whether the misconception applies to the quality of the act in question as being an offence or not. In all the illustrations annexed to the Clauses in which this word is used, for the purpose of shewing the sense in which it is to be taken, the misconception concerns the matter of fact. We understand, as we have said before, that in using this word there is a reference to Clauses 62 and 63. The misconception, it would seem, respects the circumstances, taking them wrongly to be such as would warrant the act done according to law. We beg to refer to the observations we have offered above upon the two Clauses here adverted to. Clauses 82, 87, 99, 100.

194. The Code distinguishes between cases in which the abetment is successful and those in which the effect intended is not accomplished. When the offence is committed, if the abetment is by instigation, conspiracy, or aid, the punishment is the same as if the abettor had been a party in the commission of it. Otherwise, the punishment is limited to one-fourth of the longest term of imprisonment provided for the offence intended, or fine, or both, which however is to be inflicted only, in abetment by instigation, where the abetment was attended with the actual delivery of a bribe, or with the threat of causing injury, or was committed by a person present instigating the offender to persist in the commission of the offence, and in abetment by conspiracy, when some act takes place, in pursuance of the conspiracy, and in order to the committing of the offence. In abetment by concealment, if the offence be committed and the abettor be a public servant, the offender is liable to one half of Clauses 88, 95, and 97. 90, 91, 93. 96. 101.

102 the longest term of imprisonment for the offence; if not a public servant, he is liable to one-fourth.

195. The distinction here noticed having been overlooked by some of the Officers who have offered observations on this Chapter, they have been led to impute inconsistencies which do not exist. Another, Mr. Giberne, adverting to the distinction, expresses his disapproval of it, thinking that "the person who instigates another to commit an offence "under any and every circumstance" has actually committed "his portion of the offence." He does not say however whether he would have the instigator always made punishable with the punishment of the offence which he abetted, or how he would determine the punishment. Mr. Cochrane (the Company's Standing Counsel) on this point says that he is not prepared to think that as a general principle equal punishment should be awarded to the man who abets as to the party committing an offence.

Art. 14, Sec 4, Chapter I. 196. The English Law, as it is expressed in the Digest, makes every party to a crime, as principal, in the first, or in the second degree, or as accessory before the fact, "guilty of that crime," and so far the Indian Code agrees with it. Instigations, &c. without effect are provided for separately by the English Law. In the Digest they are brought under the head of "Illegal solicitation." A specific penalty, viz. imprisonment not exceeding two years, or fine, or both, is prescribed, if the offence intended be a felony, if it be a misdemeanor the penalty is not to exceed one-half of that prescribed for the misdemeanor.

Chapter XXII. Art. 1.

Clause 89 197. The punishment is cumulative by the Indian Code when the person who instigates an offence (actually committed in consequence) does so by committing another offence, as when A by putting B in fear of death induces B to burn a stack of corn belonging to Z. Here A is punishable for the instigation under Clause 88, and the putting in fear of death under Clause 482. It is the same where the instigation is attended with the threat of causing any injury.

Clause 91.

198. Mr. W. Hudleston and Mr. A. D. Campbell concur in objecting to the accumulation of punishment in this manner, the former expressing an opinion that the rule of punishing for the greater of two or more offences is preferable.

199. The principle of rendering the punishment cumulative when two offences are committed in one transaction, is followed to a considerable extent in this Code, but with discrimination; it is ordered in Clause 58, that punishments shall not be cumulative unless it be so expressly

provided, and in Clause 59, that in no case shall be combined the punishments provided by more than two penal provisions of the Code. The question of the propriety of cumulative punishment will be more particularly considered in its proper place, in reviewing the Chapter of Punishments.

200. We have said that we consider that all who, as being actually *present* and assisting in the commission of an offence, come directly within the definition of principals in the second degree in the English Law, are regarded by the Code as accomplices in the fact, or more strictly "accessories at the fact," and guilty of the offence, without distinction. Russell 1, page 21.

201. But Clause 93, which applies to a person "*present* while any offence is committed" and "instigating the offender to *persist* in the commission of *that* offence" is thought to militate against this view, as the punishment is limited, in regard to imprisonment, to one-fourth part of the longest term provided for the offence. We apprehend that *if the offence were persisted in or renewed*, the person implicated as above would be deemed an accomplice in the fact or "an accessory at the fact" liable to the punishment of the offence. We conceive that this Clause is intended to meet a case in which the instigation has not had the effect intended. We infer this not only from its apparent tenor, but also from the position of the Clause among other Clauses providing for abetment by instigation when the offence appears not to have been committed.

202. The Clause at first sight appears obscure from the reference to an offence *committed* as identical with that which is abetted in the manner stated. The meaning as we understand it, may be best illustrated by an example, as follows: A is casually present when a mob attacks a house with the intention of sacking it. A takes no part at first, but seeing the attack suspended he instigates the mob to persist; if the attack is renewed in consequence he is liable to punishment equally with the rioters; if his instigation is without effect, he is answerable for the instigation under this Clause.

203. This Clause is limited to cases in which the offence instigated is punishable with rigorous imprisonment for a term of one year or upwards. We do not understand that it is meant to apply exclusively to cases in which *rigorous* imprisonment is prescribed *positively*, but to all cases in which it *may* be inflicted, excluding cases in which *simple* imprisonment is prescribed positively. This remark applies also to Clause 102.

204. Simple instigation to commit an offence, without the effect intended, is not punishable except under the Clause last noticed unless it be directed to the "public generally," or to "any number or class of "persons exceeding ten," it is then punishable by imprisonment which may extend to three years, or fine, or both. Mr. Cochrane objects to the principle of this provision. Mr. J. F. Thomas thinks it will open the door to malicious prosecutions unless the instigation be confined to some overt acts like the illustrations. Mr. Hudleston adopts this objection, and adds that he thinks the provision needless Mr. Campbell disagrees with Mr. Thomas and Mr. Hudleston.

Clause 94.

205. The suggestion of Mr. Thomas appears to us worthy of attention. Perhaps it may be most expedient to define the manner of instigation by the terms used in Clause 113, relating to attempts to excite feelings of disaffection to the Government, or such terms as may be settled when that Clause comes under consideration.

206. The number ten is obviously fixed arbitrarily. By Clause 127, it requires twelve persons to constitute a riotous assembly. It would seem advisable to make the number the same in both Clauses, if any number be specified. We are rather inclined to think it would be better not to specify a number. In that case the Clause should be modified by substituting for the words "or any number or class of persons exceeding ten" the words "or any class of persons."

207. We do not find any observations upon the provisions regarding abetment by conspiracy which appear to require notice, except the remark of Mr. Norton that "the conspiracy to commit an offence, say "murder, is an offence, though nothing is done," which we have to note as a mistake; and his objection to Clause 96 on the ground that the *same* punishment applies to the most trivial acts and to acts by which the object of the conspiracy may have been all but effected. The weight of the objection will be easily estimated when it is perceived that there is purposely no minimum limit to the punishment, to admit of the Judge exercising a discretion, and applying "to the most trivial" acts the most trivial punishment. The objection holds, for as much as it is worth, in every instance in which a discretion is left to the Judge.

Clauses 95 and 96.

208. We have stated above that we understand Clause 97, regarding abetment by aid, to comprehend persons who by the English Law are constructively considered to be principals in the second degree, though not present and not having any hand in causing the effect which constitutes the offence. Mr. Norton "presumes that abetment by doing

Clause 97

" an act; or by illegal omission of an act, in *actual substantive aid* of " an offence, is really meant." We believe that he does not mean substantive aid by actual assistance *in the perpetration of the offence*, but some actual though not direct aid by which the perpetration of the offence has been facilitated, in contradistinction from what, he says, the literal construction of the Clause imports, namely, that " a person omitting a " part of his duty, as by concealing any act with intention to aid it, al- " though in fact he did not aid in the design at all, may be punished as " though he had aided in an offence (say a murder) designed and com- " mitted." We apprehend that if the murder was committed, and the party omitted what it was his duty to do, with the *intention* of aiding the commission of the murder, he would be liable to punishment under this Clause, whether by such omission he did or did not *in fact* aid the commission of the murder, and we have no doubt that he ought to be so punished as equally guilty whether his *intended aid* was effectual or not.

209. Mr. Norton complains of vagueness and uncertainty by the use of such words as " intention," &c. in this Chapter, seeming to forget how language has been forced by the constructive interpretations given to the English Law on this very head, whereby to satisfy the terms " present" and " aiding" it is held that a person need not be actually present, and need not actually assist.

210. Mr. Norton says he cannot with every effort understand the distinction between the " *illegal omission*" of a Police Officer which facilitates an offence under Clause 97, and the " *concealment*" of a Police Officer which likewise facilitates an offence under Clause 101. The difference appears to us palpable. Under Clause 97, the omission respects what is either doing or is about to be done at the present time, and could not be done, in the case given as an illustration, but for the omission, which is all but a participation. In Clause 101, the concealment refers to *a design to commit* an offence at a *future* time, the commission of which the concealment may in a manner facilitate, by not exciting that attention which would probably prevent it: but this is a remote and precarious aid, which though deserving of punishment, is surely very different from that which is supposed to be rendered in the former case, conducing by an immediate influence and a positive efficacy to the commission of the offence. Clause 101

211. Upon Clause 97 Mr. J. F. Thomas observes that, as it is worded, it appears to include a case like that of the London Police Officer, who by not interfering suffered the perpetration of a murder with the view to secure the reward called " blood money," by the after appre-

hension of the murderer. He remarks that " the Officer, however inde-
" fensible his conduct, and although his omission probably led to the
" murder being actually perpetrated, yet was not in league with and had
" no intention of favoring the offenders, which is the essence of the offence
" in this Clause, but his act nevertheless falls apparently within the defi-
" nition of " aiding" by an illegal omission." We think that such an act or omission does fall, and properly so, within the definition, equally when it is prompted by the mercenary motive by which the London Police Officer was actuated, as when it proceeds from the desire to favor the offender. The " *intention*" is the same in either case " to aid the com-
" mission of the offence," and that is what constitutes guilt under this Clause, whatever may be the motive. It therefore appears that it would be unnecessary to modify the Clause as Mr. Thomas suggests, even if there were any such a system in operation here as that to which he alludes, which we need hardly say there is not.

212. Clause 98 makes the previous abettor of an offence liable to the punishment of a different offence which may be committed in consequence of his abetment of the intended offence, if he knew that such different offence was likely to be committed in the attempt to commit the intended offence. This appears to us to agree substantially with Article 13, Section 4, Chapter I of the Digest of the English Criminal Law. It differs in making the abettor liable to cumulative punishment if the intended offence be also committed, according to the principle of this Code.

213. Many objections are made to this Clause with reference to the condition that the abettor *knew* that the different offence was *likely* to be committed. Similar objections are made to other Clauses which we need not particularly notice. They are sufficiently answered we conceive by the observations we have already offered in commenting upon the Chapter of General Exceptions with respect to the definition contained in Clause 26.

Clause 99

214. Upon Clause 99 Mr. W. Hudleston remarks that it " exhibits
" refinement bordering upon unintelligibility wholly out of place in a
" Criminal Code, and so worded that the meaning would escape discovery
" without the illustrations." The Clause appears to us also to be expressed somewhat obscurely, though certainly not to such a degree as to be unintelligible without the illustrations as Mr. Hudleston avers. These are however an important help.

Illustration (*b.*)

215. The meaning we gather to be, first, that when a person abets the doing of a thing which he knows to be a certain offence, and it is

done according to his intention, if from some misconception on the part of the doer his act does not fall within the definition of that offence, the abettor nevertheless shall be liable to the same punishment as if the doer could be convicted of that offence. Or if *in consequence* of the abetment, that is, in endeavoring to effect what the abettor intended, something is done which *is* an offence under one Clause of the Code, but would be an offence under *another* Clause, but for some misconception on the part of the doer which mitigates it, from which misconception the abettor is free, the abettor shall be liable to punishment under *that other* Clause. Secondly, that if a person abets the doing of a thing which is an offence, (a.) for example by supplying means for the purpose, and through and in consequence of such abetment, for example, by using the means supplied by him for committing the offence which he intended, a different and more heinous offence is committed intentionally, but without his knowledge, the abettor shall be liable only, to the punishment to which he would have been liable if the offence which he intended had been committed, or to the punishment to which the actual offender would have been liable, but for the intention entertained by him unknown to the abettor, by which his offence was aggravated so as to subject him to a higher penalty.

216. The principle of the second provision seems to be recognized in Articles 16 and 17, Section 4, Chapter I. of the Digest.

217. If the scope of the Clause be as we have understood it, the provisions contained in it would seem to be by no means an unnecessary refinement.

218. The provision contained in Clause 100 appears to us clearly expedient. Clause 100

219. Upon the Clauses regarding abetment by concealment we see no occasion for remark in addition to what we have already submitted. Clauses 101 and 102

220. We come now to the Clauses relating to "subsequent abetment," corresponding with what in the English Law hitherto has constituted the offence of an "accessory after the fact," an offence which does not appear in the Digest of the Criminal Law Commissioners. "There seems "to be no reason," they say in their 7th Report, "for continuing the pro- "visions as to accessories after the fact, the offences of parties falling "within this description at present being for the most part referable to "the class of offences against public justice, we have dealt with them as "such." So also in this Code acts by which according to the English Law a man would be liable to the punishment of an "accessory after the Subsequent abetment Clauses 103 to 108.

fact," as harbouring and concealing an offender with the intention of preventing him from being taken into custody, are provided for in the Chapter "of contempts of the lawful authority of public servants."

Chapter IX Clauses 177 and 178

221. Mr. Norton sweepingly objects to the provisions under this head, on the ground that "so far from being applicable as *universal* rules "it appears to his mind impossible to read one of them which could not "be in the most obvious manner falsified by other cases than those spe-"cified by way of illustration;" he does not however support this allegation by any instances.

222 He further avers that "under some of these Clauses, ignor-"ance of the law and misconceptions of it form no excuse, under others "knowledge of the existing law in reference to the offences committed "and abetted, as clearly does form a substantive ingredient, and ignor-"ance of that law an excuse. That knowledge of the law too required "as the criterion of guilt or innocence, has reference to *details* such as "the quantity of punishment (for instance) affixed to the crime abetted." Mr. Norton does not specify the particular Clauses to which these remarks point, but he seems to refer to Clause 104, in which a person is said subsequently to abet an offence when he abets "what he would know to "be an offence but for his ignorance of the law," as inconsistent with Clauses 105 and 106. He appears to think that under Clause 105 a man could not be convicted of subsequent abetment who did not know himself to be directed by law according to the words of the Clause, and under Clause 106, who did not know positively that the offence was "punish-"able with rigorous imprisonment for one year or upwards."

223. To take the last instance first, it is obvious to remark that the reference to the punishment is merely a way of intimating that the rule is not to be applied to the lesser offences. In the Digest it is proposed to classify crimes other than treasons, as felonies and misdemeanors, not as heretofore, but with reference to the punishments to which they are liable. Felonies to consist of crimes punishable with death or transportation, misdemeanors, of crimes punishable otherwise, that is, all other crimes. According to the nomenclature of the Digest to say that a felony has been committed is in other words to say that an offence has been committed that is punishable with death or transportation.* This explanation applies also to Clause 107. It seems to us that the wording of Clause 106 and Clause 107 ought to correspond. We prefer the wording of Clause 107 as the more simple, "whoever subsequently abets any "offence", &c., what is abetting an offence being already defined in Clauses 103 and 104

* In Art 28, Sec 5, Chapter V of the Digest relating to concealment of offenders, the punishment to which the party concealing an offender is liable depends upon whether the offence committed was or was not punishable by transportation, or was or was not punishable with death

224. With respect to Clause 105 we do not suppose that it was intended to allow a party to escape by pleading ignorance that he was "directed by law to give information, &c." But to prevent such a construction we would suggest the substitution of the word "being" for "knowing himself to be." There appears no more reason for these words importing that the party knew what the law required of him, in this Clause, than in Clause 102, which makes concealment an offence.

225. Objection is made by Officers of all the Presidencies to the punishment for subsequent abetment in Clause 106 as too lenient. The abetment here is assisting to conceal an offence "by causing any marks "of the commission of the offence to disappear." The example is assisting a murderer to hide the body of his victim. The punishment may extend to one-twelfth part of the imprisonment for the offence. Murder is liable to the punishment of imprisonment for life, as alternative for death. By Clause 48 in calculating portions of terms of imprisonment, imprisonment for life is to be reckoned as equivalent to imprisonment for 24 years. The abettor is therefore liable to imprisonment for 2 years as the maximum term, with fine in addition at discretion. This punishment is considered too light for the case stated, and inadequate generally, on the ground that the subsequent abettor is in most cases a previous abettor also, though he may have kept himself free from any apparent complicity sufficient to convict him of that offence. It does appear to us that when a person previously abetting an offence by any act or omission intended to aid it, is punishable with the full penalty of the offence, a person so closely connected with the offence after its commission as to be within the definition in this Clause by acts manifesting a sympathy with the offender and strongly indicative of assent to the offence, ought to be punishable more severely than by a twelfth part of the penalty of the offence. The receiver of stolen property may be considered as a subsequent abettor, but such an offender is liable to imprisonment for three years, if the property has been obtained by theft, to transportation or imprisonment for life, if it has been obtained by dacoity.

Clause 97.

Clause 390
Clause 391.

226. There is an "exception" to Clause 107, relating to the harbouring of offenders, declaring that it does not extend to "harbour given "by the husband and wife, or relation in the direct ascending or "descending line, or brother or sister of the person to whom harbour is "given."

227. A similar exception is annexed to Clause 177 and to Clause 206. It is objected to by several Officers as giving too great a license Mr. J. F. Thomas says "This provision taken from a Code enacted for a

" different state of society is, I am inclined to think, only in part applica-
" ble to this country. I would retain the exception as regards the hus-
" band and the wife, the mother, the daughter, and the sister by whole
" blood. But I would not retain it in the case of brothers or sisters by
" half blood, nor even in the case of father and son, grandfather and
" grandson, nor of brothers, unless it was satisfactorily established, that
" these relatives were themselves wholly free from suspicion, not only in
" the special case in which they harboured, but that their characters, and
" habits, were at all times those of honest men. Constituted as society is
" in India, where whole castes, (as Cullers and Marawars in our Southern
" Provinces, Coorumburs, Cochawars, &c. elsewhere) are by birth,
" fraternities of thieves and plunderers, where each member of a
" family is at all times ready to join his relation in robbery, or theft,
" if the father, brother, &c. is allowed to render to his criminal relative
" this assistance ad libitum, we shall greatly diminish the security of
" person and property."

228. Mr. H. C. Tucker, of the Bengal Civil Service, thinks that the exception should only extend to husband and wife. Mr. E. H. Monckton, of the same Service, observes that " a man for example, who was in the " habit of harbouring thieves,* ought not to get off if it was proved he had " been in the habit of concealing his son under similar circumstances."

Russell 1, page 36. Digest Art. 11, Sec. 2. Chapter I.

229. By the Law of England it is only the wife who is exempted from the penalty for receiving or harbouring an offender.

Art. 248.

230. By the French Code Penal are excepted " Les ascendants et " descendants, epoux ou epouse, même divorcés, freres ou sœurs des cri-" minels recélés, ou leur alliés aux mêmes degrés."

231. Mr. Livingstone's Code for Louisiana excepts the husband or wife of the offender ; his relations in the ascending or descending line, either by affinity or consanguinity ; his brothers or sisters ; his domestic servants.

232. The exception in the Indian Code while it goes greatly beyond the narrow line of the Law of England it will be perceived falls short of both the other Codes referred to. We think it would be better to restrict it still more by excluding relations in the ascending or descending line beyond the first degree, and perhaps also brothers and sisters.

* This example is not exactly apt as the Clause does not apply to thieves, who are not punishable with imprisonment for seven years, except under the aggravation described in Clause 367.

CHAPTER XVIII.

OF OFFENCES AFFECTING THE HUMAN BODY.

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233. Sir R. Comyn, as we have already noticed, observes upon this important Chapter that the only part of it which appears to him objectionable is Clause 298, touching "voluntary culpable homicide by consent."

234. Mr. Giberne, one of the Judges of the Sudder Court at Bombay, makes the following remarks: "Chapter XVIII. may be considered "one of the most important of the Code. The first class of offences "against the body, includes certain omissions as well as acts, the line "denoting which is admirably defined. The second mitigated form of "murder, voluntary culpable homicide by consent is peculiarly adapted "to cases likely to occur in the country, such as Suttees, administering "medicines to procure abortion, &c. &c. In short all the different divi-"sions and definitions of the crimes provided for in this Chapter have "been arranged with such accuracy and care, the principles and reason-"ing in the Note M are so clearly and fully shewn, that it appears to me "that all that was required has been accomplished, and every remark "anticipated."

235. Mr. Norton says, "There is much in this Chapter to assist an "effort as feasible as meritorious, that of a sound and distinctive digest "of the various crimes of wilful injury to the person. At the same time "I am compelled to the opinion that this effort has been too ill accom-"plished by the present Chapter to admit of its being brought into prac-"tical operation."

236. Mr. W. Hudleston says, "I do not perceive the necessity for "the several novel designations of crime adopted in this Chapter, and "with regard, generally, to the provisions for homicide, I am of opinion "that the Law of England on this subject suffices for all practical "purposes, and is every way preferable to the refinements of this Code."

237. We have already considered the remarks made by Mr. Norton upon the distinction between the doing an act with an intention to effect a certain result, and the doing it with a knowledge that it is likely

to produce that result, and those of Mr A. D Campbell, upon the confounding, as he expresses it, of intent with mere knowledge of what is likely; and we have discussed this leading principle of the Code by which men are held to be responsible for the consequences which they know are likely to result from their acts, as well as for what they directly intend, so fully, that there appears to be no occasion for further remark in vindication of the definitions in this Chapter which bring it prominently forward.

OF OFFENCES AFFECTING LIFE.

Note M page 53

238. The Commissioners call attention to the expression "omits what he is legally bound to do" in the definition of voluntary culpable homicide, which words, or other words tantamount in effect, frequently recur in this and other parts of the Code.

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239. "What we propose," say the Commissioners, "is this, that "where acts are made punishable on the ground that they have caused, "or have been intended to cause, or have been known to be likely to "cause a certain evil effect, omissions which have caused, or which have "been intended to cause, or which have been known to be likely to cause "the same effect shall be punishable in the same manner, provided that "such omissions were on other grounds *illegal*," according to the explanation of that term contained in Clause 28.

Chapter XV Sec 1, Art. 1

240. In the Digest of the English Criminal Law framed by Her Majesty's Commissioners it is declared that "the law takes no cognizance "of homicide unless death result from bodily injury caused by some act "or unlawful omission," and it is explained that "the terms 'unlawful "omission' comprehend every breach of duty imposed by the law to do "any act or supply any thing necessary for the sustentation or preserva-"tion of human life, or for the prevention of injury to the person."

241. It seems to us that the line drawn in the Indian Code by the use of the adjectives "legal" and "illegal" applied to the duty and the omission respectively, is perfectly plain and intelligible, at the same time that it is just and right, and it does not appear to differ from the rule of the English law as laid down in the Digest. Nor do we see that the principle is excepted to expressly in any of the reports on the Code, though from the comments made upon some of the illustrations (by Mr. Hudleston* particularly) it would seem not to have been altogether approved, perhaps from not being perfectly understood.

* See remarks on the illustrations *e*, *f*, *g*, under Clause 294

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242. The next point to which the Commissioners call attention in the Note on this Chapter is the unqualified use of the words "to cause

death" in the definition of voluntary culpable homicide. "We long consi-
"dered," say they, "whether it would be advisable to except from this
"definition any description of acts or illegal omissions, on the ground that
"such acts or illegal omissions do not ordinarily cause death, or that they
"cause death very remotely. We have determined however to leave the
"Clause in its present simple and comprehensive form."

243. "There is undoubtedly a great difference between acts which
"cause death immediately, and acts which cause death remotely; be-
"tween acts which are almost certain to cause death, and acts which
"cause death only under very extraordinary circumstances. But that
"difference, we conceive, is a matter to be considered by the tribunals
"when estimating the effect of the evidence in a particular case, not by
"the Legislature in framing the general law. It will require strong
"evidence to prove that an act of a kind which very seldom causes
"death, or an act which has caused death very remotely, has actually
"caused death in a particular case. It will require still stronger evidence
"to prove that such an act was contemplated by the person who did it
"as likely to cause death. But if it be proved by satisfactory evidence
"that death has been so caused, and has been caused voluntarily, we see
"no reason for exempting the person who caused it from the punishment
"of voluntary culpable homicide." After giving some illustrations of their views on the subject, and discussing the reasons for which Mr. Livingstone excepted certain cases which their definition includes, they say finally: "The general rule, therefore, which we propose is, that the ques-
"tion whether a person has by an act or illegal omission voluntarily
"caused death shall be left a question of evidence to be decided by the
"Courts according to the circumstances of every case."

244. One of the cases alluded to as excepted by Mr. Livingstone is where death is produced by the effect of words on the imagination or the passions. This case is also excepted in the Digest of the English Criminal Law in which death resulting from "bodily injury" is "con-
"tradistinguished from death occasioned by any influence on the mind,
"or by any disease arising from such influence." The reason of this distinction is given by Her Majesty's Commissioners in the following quotation:— Chap XV, Sec. 1, Art 1.

"If any man either by working upon the fancy of another, or possi- 4th Report p. 72.
"bly by harsh or unkind usage puts another into such a passion of grief
"or fear that the party either dies suddenly, or contracts some disease
"whereof he dies, though, as the circumstances of the case may be, this
"may be murder or manslaughter in the sight of God, yet in foro

"humano it cannot come under the judgment of felony, because no "external act of violence was offered whereof the Common Law can take "notice." 1 Hale's P. C. 429.

Note M page 57

245. The framers of the Indian Code say "it would be most difficult "to prove to the conviction of any Court that death had really been the "effect of excitement produced by words. It would be still more "difficult to prove that the person who spoke the words anticipated from "them an effect which, except under peculiar circumstances, and on "very peculiar constitutions, no words would produce. Still it seems "to us that both these points might be made out by overwhelming "evidence; and supposing them to be so made out, we are unable to "perceive any distinction between the case of him who voluntarily causes "death in this manner, and the case of him who voluntarily causes death "by means of a pistol, or a sword. Suppose it to be proved to the "entire conviction of a Criminal Court that Z, the deceased, was in a "critical state of health, that A, the heir to Z's property, had been "informed by Z's physicians that Z's recovery absolutely depended on "his being kept quiet in mind, and that the smallest mental excitement "would endanger his life, that A immediately broke into Z's sick room, "and told him a dreadful piece of intelligence which was a pure inven-"tion, that Z went into fits, and died on the spot, that A had afterwards "boasted of having cleared the way for himself to a good property by "this artifice. These things being fully proved, no Judge could doubt "that A had voluntarily caused the death of Z; nor do we perceive any "reason for not punishing A in the same manner in which he would "have been punished if he had mixed arsenic in Z's medicine."

(b) A with the intention or knowledge aforesaid, relates agitating tidings to Z, who is in a critical stage of a dangerous illness Z dies in consequence A has committed the offence of voluntary culpable homicide

246. Mr. Norton, Mr Hudleston and Mr. A. D. Campbell all object to the illustration (b) which is appended to Clause 294 to shew that the definition includes cases in which death is produced by the effect of words, on the principle above advocated, but it does not appear to us that any of them has given due consideration to the reasoning in support of it; certainly none of them has answered that reasoning.

247. Mr. Pyne however observes that such tidings (as supposed in the illustration) may be communicated without a particle of malice, and still with the knowledge that the narrator is likely thereby to cause the death of his auditor. This he illustrates by a passage in the Memoirs of Sir Walter Scott, in which the publisher of his works is quoted as saying that to have made him aware of the condemnation of one of his works, in his then state, would have been his death warrant. Upon which Mr. Pyne asks, supposing his friends to have done so, and the fatal event con-

templated to have followed, should such a consummation have subjected them to be branded as murderers?

248. The case, it seems to us, would depend upon whether it could be alleged with truth, and satisfactorily proved, that the communication was made in good faith for the benefit of the party, in circumstances that his consent to suffer the consequences might be fairly considered as implied. The case being so would fall under the exception contained in Clause 70. In the instance of Sir W. Scott, if, for example, he were unduly relying on the value of the copyright of the work in question in making some arrangements of his affairs, we can conceive that it might be certainly for his benefit, within the meaning of the exception, to communicate the truth to him. It is hardly conceivable that his friends would make such a communication to him, knowing that it would probably be his "death warrant," without some cause for which they believed it to be their indispensable duty to him to do so.

249. Having maturely considered the matter, we come to the same conclusion with the authors of the Code, that if death is certainly caused by words deliberately used by a person with the intention of causing that result, or with the knowledge that in the condition of the party to whom the words are spoken it is likely that they will make such an impression upon him as to cause his death, and without any such excuse as is admissible under any of the provisions in the Chapter of General Exceptions, there is no sufficient reason why that person should be excepted from the penalty of culpable homicide, any more than one who has caused death by the infliction of a bodily injury which he knew to be likely to cause death. Here is the wilful doing of that which is known to be likely to produce evil, manifesting the *mens rea* essential to criminal responsibility; the evil produced is death; the efficient cause, the words spoken. It is scarcely agreeable to reason, that having traced the effect to its cause, the law should refuse to acknowledge it as an effective cause; or that the Judge should be obliged to say, it is true the effect was produced by the operation of words, but words in law are not an act, therefore the speaker is not criminally responsible.

250. Another case mentioned as excepted from the definition of homicide by Mr. Livingstone, but included in that given in this Code, is where "a person dies of a slight wound which from neglect or from the "application of improper remedies has proved mortal." Note M p 58.

251. Two examples are given to illustrate the views of the authors of the Code on this point. The first case is as follows: A inflicted a

slight wound on Z, a child who stood between him and a large property It is proved that the ignorant and superstitious servants about Z applied the most absurd remedies to the wound, and that under their treatment the wound mortified and the child died. Letters from A to a confidant are produced. In those letters A congratulates himself on his skill, remarks that he could not have inflicted a more severe wound without exposing himself to be punished as a murderer, relates with exultation the mode of treatment followed by the people who have charge of Z, and boasts that he always foresaw that they would turn the slightest incision into a mortal wound. Of this case we must say that it appears to us a most improbable one: though if such evidence were produced we could not but agree to the conclusion of the Commissioners that the party proved to have acted in the manner represented ought to be punished as a murderer, because it would be clear that in inflicting the slight wound he intended to cause the death of the person wounded. We can however scarcely imagine a person inflicting such a wound with the intention imputed, in the expectation that though it was but " the slightest incision" it would be so ill-treated by the ignorant and superstitious servants about the wounded person that it would certainly prove mortal. We can easily imagine a person with the feelings supposed congratulating himself on the result of his act so turned to his advantage, but it is difficult to conceive him contriving his act so astutely, and counting with such foresight, as is predicated, on the involuntary co-operation of others to effect his object while they meant to remedy the injury he had caused.

252. In the second case given by way of illustration there is, as observed by the Commissioners, no doubt whatever as to the intention, and therefore we agree with them that however slight the wound inflicted may have been, yet if it ultimately proves mortal, there is no reason for not punishing the person who inflicted it with the intention of murder, as a murderer.

253. It is because it is hardly possible to conceive murder to have been originally intended in the first of the two instances here adverted to, that we are doubtful of the propriety of putting it as a case within the definition in Clause 294, for fear of its leading to a latitude of construction which under some supposed analogy may include predicaments quite beyond its scope.

254. Mr. A. D. Campbell remarks that " though the Commis-
" sioners in express terms state, that in India 'we have reason to fear
" ' neglect and bad treatment are far more common than good medical
" ' treatment,' instead of urging this as the strongest possible reason why

Note M. page 58.

" 'the case of a person who dies of a *slight* wound, which *from neglect* " 'or from the application of *improper remedies* has proved mortal,' " should, as in Mr. Livingstone's Code, be excepted from homicide, they " actually urge it as the very reason why, in this country in particular, " the inflicter of a mere scratch, should in such cases, on the contrary, be " constituted a murderer."

255. Mr. Campbell it appears to us has failed to apprehend the bearing of the remark which he quotes. The meaning of the Commissioners we conceive to be this, that whereas in countries in which good medical treatment is common it is difficult to suppose that a person inflicting a slight wound on another could contemplate his death as a probable result, such a result may be supposed to enter into his contemplation in a country where bad medical treatment is far more common than good, and therefore the definition of homicide ought not to exclude death resulting from a slight wound as the primary or original cause.

256. It is laid down in the Digest of the English Criminal Law that it is homicide if death be caused by bodily injury " although by " proper remedies and skilful treatment death might have been prevented." Chap. XV. Sec. 1, Art. 4
" So also, although through neglect or ill-treatment, a fever or other dis- " order ensue from the injury which is the immediate cause of death." 5.
" But it is not homicide" " where the death is not caused by the injury " done, but by unskilful treatment or other cause subsequent to the " injury." 6.

257. Russell says, " Upon this subject it has been ruled, that if a man " give another a stroke not in itself so mortal but that with good care " he might be cured, yet if the party die of this wound within the year " and day, it is murder, or other species of homicide, as the case may be: " though if the wound or hurt be not mortal, and it shall be made clearly " and certainly to appear that the death of the party was caused by ill " applications by himself or those about him, of unwholesome salves or " medicines, and not by the wound or hurt, it seems that this is no " species of homicide. But when a wound not in itself mortal, for want " of proper applications, or from neglect, turns to a gangrene or a fever, " and that gangrene or fever is the immediate cause of the death of the " party wounded, the party by whom the wound is given is guilty of " murder, or manslaughter, according to the circumstances. For though " the fever or gangrene, and not the wound, be the immediate cause of " the death, yet the wound being the cause of the gangrene or fever, is " the immediate cause of the death, causa causati. Thus, it was resolved " that if one gives wounds to another, who neglects the cure of them, or Vol. 1, p. 428.

" is disorderly and doth not keep that rule which a person wounded " should do, yet if he die it is murder or manslaughter according to the " circumstances; because if the wounds had not been the man had not " died: and, therefore, neglect or disorder in the person who received the " wounds shall not excuse the person who gave them."

Death caused by false evidence in a Court of Justice.

Illustration (*d*.)

258. The following case is given under Clause 294 as falling within the definitions of " voluntary culpable homicide." " A, with the intention " or knowledge aforesaid, falsely deposes before a Court of Justice that he " saw Z commit a capital crime. Z is convicted and executed in conse- " quence. A has committed the offence of voluntary culpable homicide."

Chap. X. Page 42.

259. The reason is stated in Note G, on the Chapter of Offences against public justice. " The giving of false evidence must always be " a grave offence. But few points in penal legislation seem to us clearer " than that the law ought to make a distinction between that kind of " false evidence which produces great evils, and that kind of false " evidence which produces comparatively slight evils."

" As the ordinary punishment of false evidence, we propose im- " prisonment for a term of not more than seven years, nor less than one " year. If the false evidence is given or fabricated with intent to cause " a person to be convicted of a grave offence not capital, we propose that " the person who gives or fabricates such evidence may be punished with " the punishment of the offence which he has attempted to fix on another. " If the false evidence be given or fabricated with the intention of caus- " ing death, we propose to punish it in the same manner in which we " propose to punish the worst attempts to murder. If such false evi- " dence actually causes death, the person who has given or fabricated it " falls under the definition of murder, and is liable to capital punishment. " In this last point, the law, as we have framed it, agrees with the old " law of England, which though, in our opinion, just and reasonable, " has become obsolete."

Art. 191.

260. Mr. Livingstone seems to have proceeded on the same principle. By his Code it is provided that " if any one by means of perjury " shall cause another to be convicted of a crime, he shall suffer the same " punishment that is incurred by the commission of the crime of which " such person has been convicted by means of the perjury."

4th Report p. 34. See also Art. 8, Sec. 2, Cl. 15, of Digest. 7th Report p. 224.

261. The following are the remarks of the English Criminal Law Commissioners on this subject: " The heinous crime here alluded to was " punishable with death by the Roman Law as a species of assassination.

" See Digest, lib. 48. tit. 8, *Lex cornelia de sicariis.* Our earlier writers, " adopting the doctrine of the Civil and Canon Law, speak of it as capi- " tal homicide by the law of England; but Sir Edward Coke declares " 'that it was not holden for murder in his time,' 3 inst. 48; and Mr. J. " Foster (Crown Cases, p. 132) says that 'the practice of many ages " backwards doth by no means countenance the opinion' expressed by " the old authorities. See Blackstone's Commentaries, Vol. IV. p. 196, " and Mr. Christian's Note. Lord Mansfield, however, and several of " the Judges in his time, appear to have entertained a contrary opinion. " See 1 East's P. C. 333. From the great number of facts, (some of " them, such as the precise ground of the verdict, being very difficult of " proof) which intervene between the act of the offender and the death " of the object of his malice, it would be very difficult to prosecute such " an offence effectually, and there are strong reasons of policy against " admitting it to be murder, founded on the danger of deterring witnesses " from giving evidence in capital cases, if it must be at the peril of their " own lives. Besides, if causing sentence of death and execution by " means of perjury be murder, the causing whipping or imprisonment by " the same means would amount to the offence of assault and false im- " prisonment—a doctrine which it would be impossible to sustain. By " the Bavarian Law, Art. 292, and also by the Prussian Law, Art. " 1412, 1413, this crime, though punishable with death, is classed among " fraudulent offences, and does not constitute homicide. The Code Penal " places it under the head of false testimony." We may add that the Code Penal (Art. 361) in the case of a person being condemned upon false testimony to a more severe punishment than compulsory labour, makes the false witness liable to the same punishment.

262. Mr. Hudleston takes up the objection to bringing this offence within the definition of " homicide" which is stated by Mr. Christian in his note upon Blackstone, Vol. IV. p. 196, and alluded to in the above remarks. " In this country," he adds, " the provision for making this per- " jury capital would involve the danger of conviction of such perjury upon " false evidence. A new door would thus be opened to conspiracy."

263. His colleague, Mr. A. D. Campbell, differs from him and agrees with the Commissioners. Referring to Mr. Christian's observation quoted by Mr. Hudleston, that "few honest witnesses would venture " to give evidence against a prisoner tried for his life, if thereby they " made themselves liable to be prosecuted as murderers," Mr. Campbell says, " This appears to me a pure fallacy, by begging of the question. It " first wrongly assumes that capital punishment is to fall on the *honest* " instead of on the *dishonest* witness; and from these, evidently erro-

" neous premises, a deduction is drawn necessarily fallacious. Honest wit-
" nesses, all over the world, give evidence against prisoners tried for their
" lives, although they daily see the dishonest witness, who perjures him-
" self, punished by the pillory, or otherwise—why, I ask, should they not
" equally continue so to do, though that punishment were increased, in
" particular cases, even to death? The difference would be one in degree
" alone, the principle would remain unaltered."

264. Mr. G. W. Bacon assents to what is said by the Commissioners in the Note on this point, and thinks it " quite just and right" to treat this offence as culpable homicide.

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265. In their 5th Report the English Criminal Law Commissioners say—" In our last Report we remarked that the causing of the death of
" an innocent man by means of perjury is not punishable as murder by
" the English Law. There can however be no doubt that any conspi-
" racy to effect such an object is a crime which is justly punishable with
Chap IV Sec. 5, Art 26. " great severity." In the Digest they recommend that the latter offence shall be rendered liable to the penalties of the 7th class, viz. Transportation for life, or for any term not less than seven years, or imprisonment for any term not exceeding three years.

266. On the whole we are of opinion that the offence in question falls naturally within the definition of voluntary culpable homicide, which could not be expressed properly in terms that did not cover it; and but that we think it desirable to restrict rather than to extend capital punishment, and that it would be in effect an extension of it to make the perjurer liable to be convicted of homicide, which would be murder under Clause 295, when his false swearing has caused the condemnation and execution of an innocent person, we would not hesitate to recommend that this part of the Code be left untouched. For the reason last stated however we would advise that the illustration (*d*) be omitted under Clause 294, and that Clause 191 in the Chapter of offences against public justice be declared applicable generally to the offence of giving false evidence with the intention of causing a person to be convicted of a capital crime, whether the object intended be effected or not. The punishment which may be awarded under this Clause is transportation for life, or rigorous imprisonment for life, or for a term not less than seven years, and fine.

MURDER.

267. By Clause 295 it is declared that voluntary culpable homicide is " Murder" unless it be one of the three mitigated descriptions thereinafter enumerated, whereof the first is " Manslaughter." It is " Man-

"slaughter" (Clause 297) "when it is committed on grave and sudden "provocation by causing the death of the person who gave that provoca- "tion." MANSLAUGHTER.

268. According to the Digest of the English Criminal Law, "Ho- "micide is Manslaughter whensoever the killing is wilful, but extenuated "under certain circumstances." It is so extenuated when it is committed "under the influence of passion" excited by any act done or attempted or threatened "of an injurious or insulting character to the person "of the party killing or of any other person," or "by any other grave "cause of provocation" "to the party killing or any other person." By the Indian Code "provocation is designated as 'grave,' when it is "such as would be likely to move a person of ordinary temper to violent "passion." Chap. XV. Sec. 3, Art. 2. Sec. 2, Art. 32.

269. Under the English law the plea of provocation is not available when it has arisen from mere words, or gestures. There is no such restriction in the Indian Code. The Commissioners observe on this point as follows: "Neither the English law nor the French Code extends "any indulgence to homicide which is the effect of anger excited by "words alone. Mr. Livingstone goes still further. 'No words whatever,' "says the Code of Louisiana, 'are an adequate cause, no gestures merely "'shewing derision or contempt, no assault or battery so slight as to "'shew that the intent was not to inflict great bodily harm.' We greatly "doubt whether any good reason can be assigned for this distinction. It "is an indisputable fact that gross insults by word or gesture have as "great a tendency to move many persons to violent passion, as danger- "ous or painful bodily injuries. Nor does it appear to us that passion "excited by insult is entitled to less indulgence than passion excited by "pain." Digest, Chapter XV Sec. 2, Art. 34. Note M. p 59.

270. With reference to these observations, Mr. Pyne makes the following remarks: "It is notorious that the most common mode of offering "insult among natives of all classes, is by the display of contemptuous "gestures and the use of irritating abuse, a habit so inveterate indeed as "to lose much of the offensiveness which would mark it when addressed "to communities more sensitive and alive to this description of annoy- "ance. An indignity offered to a person in a more civilized state by a "reflection upon his integrity, an imputation upon his courage, or a stain "upon his honor, might excite in the minds of such men sudden gusts "of passion which the law scarcely might control, but upon the mass "of Indian society, the refinement of feeling which barbs such attacks "is wanting, and no gestures, words, or signs, could, I conceive, raise

" in their minds that indignation of feeling at unmerited reflections,
" which would justify the commission of voluntary culpable homicide
" under the plea of 'grave' provocation emanating from such a cause;
" and I am therefore disposed to think, from the obtuseness of feeling
" which pervades the community on this head, that the most grievous
" reproaches would not exonerate the party offended from the guilt of
" murder, if in resenting them he made use of any deadly weapon with
" the intention of producing death, and it is moreover highly essential to
" the security of life, that no such opening of committing murder under
" a mitigation of punishment dependant upon contumelious gestures,
" contemptuous actions, or insulting words, should be held out to the
" native community, as from the inbred tendency, of the lower classes
" especially, to give unrestrained freedom to the most indecent invectives,
" the deliberate murderer may by the exercise of a little ingenuity reduce
" his offence to the grade of manslaughter "

271 These remarks are deserving of attention, but it seems to us that Mr. Pyne has overlooked the discretion which is purposely left to the Court to judge whether the provocation be such as would be likely to move a person of ordinary temper to violent passion, not *any person*, it is to be understood, but a person of the same habits, manners, and feelings. A discreet Judge would of course take into consideration such points as are adverted to by Mr. Pyne, and would properly reject the plea of provocation by insulting words in one case, while he would as properly admit it in another, according as the party might be shewn to belong to a class sensitive to insults of this kind, or otherwise. The framers of the Code deemed it unadvisable to lay it down as a *rule* that insults by words or gestures should be considered an adequate cause of provocation, while, for the reason assigned, they thought it proper to *allow* the plea of provocation where it may be evident that such insults have as great a tendency as bodily injuries to excite violent passion. That there are many persons of such sensitive feelings among the higher ranks of the Natives of India is a truth which needs no proof, though unquestionably few of the great mass of the people would be much affected by words which to a European of the same rank and condition would cause the highest degree of irritation.

272 The English Commissioners make the following remark upon the article excluding the plea of provocation arising from mere words, &c.

4th Report p 38 " We have framed the article as nearly as we could in conformity with
" the authorities, which, whilst they, in many instances, recognize very
" slight causes of extenuation, do not extend an express negative beyond
" the limits of our rule It seems to us, however, to be very question-

" able whether this rule, large as it may seem, is strictly in accordance " with principle, for words or gestures may often be infinitely more irri- " tating and provoking than a personal injury of a trivial nature. It is " extremely difficult, if not impossible, to define all the causes of provo- " cation which ought to extenuate homicide, and we do not see any mode " by which the object of the law can be satisfactorily accomplished, un- " less it be by making the existence of reasonable provocation, within " certain limits, a matter of fact to be decided by a jury. In France the " difficulty has been in a great degree evaded by the law introduced in " 1832, enabling juries to find ' attenuating circumstances,' and though " we think a general law of this kind is liable to serious objection, the " occasional introduction of a similar principle where precise definition is " impracticable might perhaps be desirable."

273. The Indian Code does not allow the extenuation of " voluntary culpable homicide" to " manslaughter" on the plea of provocation, if that provocation be given by any thing done in obedience to the law, or authorized by the law of Civil or Criminal procedure, or done by a public servant in the exercise of his lawful powers, or by any person in the exercise of the right of private defence against the offender. Clause 297, *Explanation.*

274. Mr. W. Hudleston, commenting on Clause 297, says generally, " the definition of manslaughter in the law of England appears to me " preferable to this—there it is clear and distinct, here it is vague and " liable to diversity of interpretation." He points particularly to the illustration (*d*) of provocation given in the exercise of the right of private defence, as contradicting the English law which he prefers. Mr. Norton adverting to the same illustration, " notices the construction " given to death caused by a party who in a sudden affray and in resent- " ment of a blow kills his antagonist—this is construed *murder* in case the " blow resented was given in self-defence following upon an assault " by the killer. Now, (he observes) this construction of guilt, depending " on who was the first actual personal aggressor and not on the sudden- " ness and heat of the affray, is quite as contrary to principle as it is to " the English law." Mr. Norton concludes thus, " it is clear that the " Commissioners have not adverted to the doctrines and principles of the " English law of self-defence."

275. With all deference to Mr. Hudleston and Mr. Norton we are inclined to think that they are mistaken in averring that the illustration in question contradicts the law of England. The case is this—A attempts to pull Z's nose; Z in defence strikes A; whereupon A kills him. By the Penal Code this is not manslaughter but murder. What is it by the

law of England? We apprehend that it is either "murder," or "homicide justifiable in self-defence." According to the Digest of the English Criminal law "homicide when necessary for self-defence is justifiable "although the party using the plea was guilty of an assault" (as in this case) "which led to the fatal result," *provided*, among other things, that "he killed the assailant *from necessity in order to avoid immediate death*." Now in the case supposed there is no appearance of any such necessity. It is therefore not "homicide justifiable in self-defence." We take it to be the alternative "murder." Mr. Norton thinks it is "manslaughter," "for the actual first aggression *may* have been slight and the provocation to it great, and the continuance of the affray and the heat and "danger to the killer arising out of it imminent and engrossing." But all this is contrary to the supposition. The aggression is supposed not to have been slight, but one extremely provocative, "A attempts to pull Z's nose," an aggression which if completed is viewed by the law as of so grave a character that if Z killed the aggressor he would not be guilty of murder but of manslaughter; no provocation whatever is alleged for the aggression; and there is no intimation that A was in any danger of further injury from Z if he had "retreated from conflict," which is another point to be proved in support of the plea of justification on the ground of self-defence. "It is agreed," it is said, "that if a man strike "another upon malice prepense and then fly to the wall, and there kill "him in his own defence he is guilty of murder." See authorities quoted in Tomlins, Art. Homicide II. 2.

Chapter XV. Sec. 2, Art. 27.

276. Mr. A. D. Campbell says, "contrary to my colleague, I think "under the reasons given in Note M pages 59 and 60, that the principle "of this Clause (297) is right, but I entertain doubts of the propriety of "most of the virtual exceptions from its text, which are given under "the head of '*Explanation*.' I mean with regard to the words which "follow passion, for in what is done under cover of obedience to the law, "and still more under cover of its authority, or by public servants in the "lawful exercise of their powers, or even in self-defence, there may be "given such grave and such sudden provocation, as never, in justice, "ought to permit the death to amount to murder, but should confine it "to the lower crime of manslaughter. As well explained in the Notes, "the essence of extenuation from murder to this crime, consists entirely "in the provocation given."

277. We apprehend that grave provocation given by any thing done under *cover* of obedience to the law, or under *cover* of its authority, or by a public servant, or in defence, *in excess* of what is strictly warranted by the law, in point of violence, or as regards the means used,

or the manner of using them, and the like, would be admissible in extenuation of homicide under this Clause. For example, take the case of Wat Tyler referred to in the Note to this Chapter. Here was a public officer, a tax gatherer, who came to "exercise his lawful powers" in that capacity, but doing so in a manner unwarranted and highly offensive, Tyler was excited to "violent passion," and in his rage killed him on the spot. The Commissioners upon this say, "so far, indeed, should we be from "ranking a man who acted like Tyler with murderers, that we conceive "that a Judge would exercise a sound discretion in sentencing such a "man to the lowest punishment fixed by the law for manslaughter."

278. Under the above construction of the exceptions in respect to provocation subjoined to Clause 297, we see no valid objection to them, but if our construction be wrong, and we do not feel perfectly confident of its correctness, we should be disposed to think that some qualification is requisite.

279. We entirely agree with the authors of the Code in allowing such provocation as that which excited Wat Tyler to commit homicide, to be adequate in law, that is to say, in allowing the plea of provocation in cases in which the act done may have no tendency to cause pain or danger, or in any way to injure the person, and may wound only the honor or the affections; and it seems to us that this is allowed by the English law, by which, according to the Digest, passion excited by any act done "of an "*insulting* character, to the person of the party killing or of *any other* "*person*," is sufficient to extenuate the guilt of killing. Chapter XV Sec 2, Art. 32

280. But manslaughter by the law of England includes not only cases in which homicide is wilful but extenuated, but "also where death "is occasioned not wilfully, but culpably through want of reasonable care "and caution, also where death is occasioned not wilfully but in consequence of any unlawful violence or injury to, or endeavor to injure the "person of any other." Chap. XV Sec 3, Art 2.

281. We presume that Clause 304 of the Indian Code is intended to provide for such cases, among other cases of homicide described in Note M, as "culpable yet not voluntary." This Clause will be considered in its proper place. p 63.

282. "The second mitigated form of voluntary culpable homicide," say the Indian Law Commissioners, "is that to which we have given the "name of 'voluntary culpable homicide by consent.' It appears to us that VOLUNTARY CULPABLE HOMICIDE BY CONSENT. p 61. Clause 298

" this description of homicide ought to be punished, but that it ought not " to be punished so severely as murder." " Our reasons for not punishing " it so severely as murder are these. In the first place the motives which " prompt men to the commission of this offence are generally far more " respectable than those which prompt men to the commission of murder. " Sometimes it is a strong sense of religious duty, sometimes a strong " sense of honor, not unfrequently of humanity. The soldier who, at the " entreaty of a wounded comrade, puts that comrade out of pain, the " friend who supplies laudanum to a person suffering the torment of a " lingering disease, the freedman who in ancient times held out the " sword that his master might fall on it, the high born native of India " who stabs the females of his family at their own entreaty in order to " save them from the licentiousness of a band of marauders, would, " except in Christian societies, scarcely be thought culpable, and even in " Christian societies, would not be regarded by the public, and ought " not to be treated by the law as assassins."

" Again, this crime is by no means productive of so much evil to " the community as murder. One evil ingredient of the utmost import- " ance is altogether wanting to the offence of voluntary culpable homi- " cide by consent. It does not produce general insecurity. It does " not spread terror through society. When we punish murder with such " signal severity we have two ends in view. One end is that people may not " be murdered. Another end is that people may not live in constant dread " of being murdered. This second end is perhaps the more important of " the two. For if assassination were left unpunished the number of persons " assassinated would probably bear a very small proportion to the whole " population. But the life of every human being would be passed in cons- " tant anxiety and alarm. This property of the offence of murder is not " found in the offence of voluntary culpable homicide by consent. Every " man who has not given his consent to be put to death is perfectly certain " that this latter offence cannot at present be committed on him, and that it " never will be committed, unless he shall first be convinced that it is his " interest to consent to it. We know that two or three midnight assas- " sinations are sufficient to keep a city of a million of inhabitants in a " state of consternation during several weeks, and to cause every private " family to lay in arms and watchmen's rattles. No number of suicides, " or of homicides committed with the unextorted consent of the person " killed, could possibly produce such alarm among the survivors."

" The distinction between murder and voluntary culpable homicide " by consent has never, as far as we are aware, been recognized by any " Code in the distinct manner in which we propose to recognize it. But

" it may be traced in the Laws of many countries, and often, when neg-
" lected by those who have framed the Laws, it has had a great effect on
" the decisions of the tribunals, and particularly on the decisions of tribu-
" nals popularly composed. It may be proper to observe that the burn-
" ing of a Hindoo widow by her own consent, though it is now, as it
" ought to be, an offence by the regulations of every Presidency, is in no
" Presidency punished as murder."

283. In the Digest of the English Criminal Law it is declared that " homicide is neither justified nor extenuated by reason of any consent " given by the party killed." Chapter XV Sec. 2, Art. 38.

284. Of the Clause in the Indian Code which recognizes " voluntary culpable homicide by consent" as a distinct offence less than murder, Sir R. Comyn observes, " the Clause, it is true, is guarded by several " provisions, one of which relates to the state of mind of the party con-
" senting to be killed, but, putting aside for argument's sake all religious
" considerations of a future state, and merely adverting to man's strong
" natural love of life, even in the most desperate circumstances, the mere
" fact of a person consenting to be killed would indicate a morbid state
" of mind sufficient to raise a doubt of his sanity. I cannot think that
" in any country, or under any religion, *voluntary* homicide should be
" leniently dealt with, or that any special circumstances, like those sup-
" posed in the Note, would justify a law introducing the novel offence of
" homicide by consent."

285. Sir J. Awdry, referring to the Chapter of General Exceptions, says—" I agree to the exceptions grounded on the sanctity of human life,
" and I wish that they (the Commissioners) had elsewhere followed up the
" principle instead of providing that homicide by consent should not be
" murder. The prerogative of mercy would much better be allowed to
" apply when necessary to such cases, than a rule be laid down that a
" man has to some extent a right to authorize its destruction."

286. Mr. Hudleston says " it appears to me no alleviation of homi-
" cide that I have another's consent to kill him." Mr. A. D. Campbell on the other hand considers that the reasoning in page 61 of Note M fully justifies the general principle.

287. Mr. Norton says " I had imagined that the Clause 298 was
" devised with a view mainly of punishing duels with a mitigated sen-
" tence, and for distinguishing deaths by such a deliberate act from
" murders. I was disposed under that impression to intimate my concur-

" rence. But neither in the illustrations or the Notes is any such object " alluded to, and the only application of the Clause seems to me to be to " cases of extraordinary local superstitions (better legislated upon speci- " fically) or to those which are almost, or purely imaginary. The Clause " in this view appears to me unnecessary and liable to ridicule."

288. Mr. Greenhill, a Judge of the Sudder Court at Bombay, understands this Clause to include fatal duels.

289. The Judges of the Sudder Court North Western Provinces, observe that duelling is not specifically alluded to in the Code—but they conclude that it is provided for in Clause 294 and Clause 320 according as death or wounding may have ensued.

290. We observe that in the Draft of the Code first printed a duel was given as an illustration of " voluntary culpable homicide by consent." The wording of the definition was slightly altered on revision, but we think Clause 298 as it stands takes in the case of a person killed in a duel as one " who suffers death or takes the risk of death by his own " choice." And if the Clause be retained, if voluntary culpable homicide by consent be recognized as a distinct offence, we know not but it may be the best way of dealing with a species of crime which it has hitherto been found impossible to deter men from by the dread of capital punishment. It is in vain to denounce a penalty which is so contrary to the general sentiment, that except in cases marked by extreme malignity, or some special aggravation rousing indignation against the offender, it could not be executed without shocking the public sense. Yet this is just what must be said of the penalty of death threatened by the existing law to the person who kills another in what is called a fair duel—threatened but so rarely enforced, that it carries no terror with it, no terror at least of that which it threatens. It might be well worth a trial whether the certain expectation of punishment for culpable homicide by consent, the enforcement of which would surely be approved by the public mind, would not be more efficacious in preventing duels in which life is risked, than the present empty denunciation of the law. The penalty proposed is imprisonment of either description for a term which may extend to fourteen years, and must not be less than two years, which may be combined with fine at discretion

291. It is probable that the authors of the Code were led to distinguish this form of voluntary culpable homicide, by the consideration of the case stated in the first illustration (*a*), of a Hindoo widow who with her own consent has been burned with the corpse of her husband.

They were obliged to provide for this case which was already the subject of penal enactments in the Regulations for the Company's Courts. They found that " the burning of a Hindoo widow by her own consent though " it is now, as it ought to be, an offence by the Regulations of every Pre- " sidency, is in no Presidency punished as murder." By Regulation XVII. of 1829 of the Bengal Code, copied exactly in Regulation I. of 1830 of Madras, and followed substantially in Regulation XVI. of 1830 of Bombay, the offence is declared to be " culpable homicide," punishable in the Presidencies of Bengal and Madras by fine, or by imprisonment, or by both fine and imprisonment at the discretion of the Court, and in the same manner, except with a limitation of imprisonment to 10 years, in the Presidency of Bombay. This is not a case of " extraordinary *local* superstition" as Mr. Norton suggests, but a matter of national concern affecting a whole people, for which the Penal Code for India must legislate. The Commissioners had to consider whether they would rank this offence as murder, as falling within the definition thereof, or reduce it by a special exception to a lower grade of culpable homicide, following the existing law which had been enacted upon the most careful and solemn deliberation. They concluded that it ought not to be treated as murder. They had then to frame an exceptive definition, and the question would naturally arise whether the terms of the definition should be limited specifically to cases of Suttee, or be made general enough to comprehend other cases depending upon the same principle. This we presume was the process, the result we find in Clause 298, the terms of which are general, including all cases in which " the person whose death is caused " was above 12 years of age, and suffers death or takes the risk of death, " by his own choice."

292. We must here consider the remark of Mr. A. D. Campbell before alluded to, that the limitation as to age will, " contrary to what " is contemplated by the Code, make any one guilty of murder who in- " duces Suttee by a widow under 12 years of age." He conceives that the Commissioners meant merely to indicate the age at which persons may be taken generally to be capable of consenting, but with reference to the very early age at which females reach puberty in India and are married, he thinks that the above limitation will work differently from their intention, and exclude cases in which the party was capable of consenting and did give a free and intelligent consent to suffer death, which he supposes they did not mean to exclude.

293. We have before mentioned that there is a difference between Clause 69 and Clause 70 on this point. Under Clause 69 only a person above 12 years of age can give such a consent as will justify. Under

Clause 70, construed as it must be with reference to Clause 31, a free and intelligent consent given by a person under 12 years of age will justify, if he were able to understand the nature and consequences of that to which he gave his consent. In the Note referring to these Clauses there is no notice of this difference. In respect to both it is said indifferently that the consent required is the free and intelligent consent of a person "of ripe age." It seems however to be a condition of Clause 70, that the act in question should be proved to have been "bonâ fide for the "benefit" of the party who has suffered by it, a condition which is not found in Clause 69.

Note B. p. 16 and 17.

294. With respect to the case under consideration, we can hardly imagine that it was advisedly intended to make the difference between murder and culpable homicide by consent depend upon the circumstance of the widow at whose Suttee a person may have assisted, having been under or above 12 years of age, if she was "ripe" in both body and mind; supposing, for example, that she cohabited with her husband, and performed the ordinary duties of a wife with judgment and intelligence, and was one of whom there could be no doubt that she was able to "understand the nature and consequences of that to which she gave her consent." But it is clear that by Clause 298, if the widow be under 12, however ripe otherwise, any one assisting her to burn herself with the corpse of her husband must be found guilty of murder. We think this ought not to be. The obvious remedy is to reject the words "being "above 12 years of age," and to substitute for them the words being "capable of making an intelligent choice," and to insert the same words in Clause 31 in addition to the words "intelligent consent."

295. Mr. Campbell further remarks with reference to the explanation annexed to Clause 298 that nothing is more common than for "native women of all ages to throw themselves into wells on the merest "momentary impulse of passion, excited generally by the most trifling "causes, such as an unexpected reprimand, a thwarted wish, the colic, &c. "and those who are afflicted by such female folly, are, as its alleged "instigators, too often harassed most unjustly by the Police, for fatal "consequences produced by the deceased alone." We are inclined to think that the explanation by which "inducing a person voluntarily to "put himself to death" is declared to be voluntary culpable homicide by consent, would give an opening to a great deal of vexation and oppression in the manner suggested by Mr. Campbell. The word "inducing" is so comprehensive that it would afford ample verge and scope to malice and corruption to work safely in getting up pretended charges against innocent persons founded on circumstances in their domestic history

which may be plausibly distorted, and in causing distressing inquiries thereupon into family matters. We are led to conclude that it will be better to omit the explanation. Cognizance would then be taken only of such cases of purposed inducement to suicide as clearly amount to murder. There may indeed arise cases in which it would be improper to treat the person who had induced another to commit suicide as guilty of murder, although the circumstances of the case might be clearly within the definition, and the purpose might be evident, as for example where the high born native of India induces the females of his family to take poison in order to save themselves from pollution in an expected assault of a licentious soldiery, but such are cases to which, we agree with Sir J. Awdry, the prerogative of mercy would properly apply.

VOLUNTARY CULPABLE HOMICIDE IN DEFENCE.

Clause 303.

296. The third mitigated form of voluntary culpable homicide designated as "voluntary culpable homicide in defence," is defined in Clause 299. The punishment proposed is the same as for manslaughter, viz. imprisonment of either description for a term which may extend to fourteen years, or fine or both.

Note p 62.

297. The Commissioners observe that this portion of the law is closely connected with the law of private defence, and must necessarily partake of its imperfections. But wherever the limits of the right of private defence may be placed, and with whatever degree of accuracy they may be marked, they are inclined to think that it will be always expedient to make a separation between murder and homicide falling within the definition in this Clause. "The chief reason is that the law itself "invites men to the very verge of the crime designated as voluntary "culpable homicide in defence. It prohibits such homicide indeed; but "it authorizes acts which lie very near to such homicide, and this cir-"cumstance greatly mitigates the guilt of such homicide."

298. In cases in which it prohibits homicide, it authorizes the infliction of any harm short of death which may be necessary for the purpose of defence. "And it seems difficult (they observe) to conceive "that circumstances which would be a full justification of any violence "short of homicide should not be a mitigation of the guilt of homicide. "It is to be considered also (they say) that the line between those "aggressions which it is lawful to repel by killing, and those which it is "not lawful so to repel, is in this Code, and must be in every Code, to "a great extent an arbitrary line."

299. Referring to Clause 76 which authorizes the infliction of death in defence in certain cases of assault, and to Clause 79 which autho-

rizes the same in certain cases of theft, mischief and criminal trespass, the definition declares that homicide committed in defence in *other* cases, under circumstances that would have justified it if the right of defence extended to the causing of death in such cases, is not murder, but voluntary culpable homicide in defence. An illustration (*c*) is given to shew that it is murder if the circumstances would not have justified the infliction of death, even if the right of defence extended so far. This appears clear enough. But Mr. Norton says, " with every " effort to understand Clause 299, turning back to the Clauses therein " referred to, and their explanations and illustrations, applying the " illustrations subjoined, and consulting the Notes on this Clause, which " form no constituent part of the Code, I am obliged to give it up in despair." He adds, " if I were to judge from my own capacity, I should doubt " whether this portion of the Code was intelligible to any class." We need not point out the exaggeration which is so obvious in these remarks, as it is in Mr. Norton's criticisms on many other parts of the Code. We shall only observe, that among the many persons who have reviewed the Code, no other appears to have found it impossible to comprehend the definition in question, though several persons complain of it as obscure.

300. Mr. Hudleston is one of those who find fault with this definition. Having remarked that " it is not particularly intelligible, nor made so " by the very peculiar illustrations;" he adds, regarding the substance of the enactment, " as observed by Mr. Blane, the natives of India could " never understand the subtleties of this part of the Code, nor in my " opinion those of any other country. The restrictions of the Code upon " the right of private defence seem little suited to encourage among the " people of India a manly spirit or energetic resistance to the attacks of " robbers." Mr. Blane, after the remark quoted by Mr. Hudleston as above, expresses his apprehension that the first case of punishment of this kind would have a disheartening effect. Upon similar grounds the same gentlemen and others object, as we have before noticed, to the rules regarding the right of private defence. It is surprising however that these gentlemen, particularly Mr. Hudleston, who pointedly observes that he has not overlooked the explanations in Note M, should not have perceived that the tendency of the enactment in question is to favor persons who have been led in an energetic exercise of the right of defence to step beyond the prescribed line. The law of England, of which Mr. Hudleston so often declares his preference, treats as murder what is here brought under the mitigated description of voluntary culpable homicide in defence, a mitigation introduced, say the Commissioners, " in order " that the Courts may have it in their power to inflict a slight or a merely

"nominal punishment on acts which though not within the letter of the "law which authorizes killing in self-defence, are yet within the reason "of the law."

301. Mr. Norton it seems would adhere to the English law, of which he says—"the lines of separation of the various shades of guilt or "of justification may be narrow, but I conceive by the English law they "are clear and well founded in principle."

302. We think that the provision contained in Clause 299 is right in principle; and though at the first perusal the definition may appear somewhat obscure, yet it seems to us that it needs only to be deliberately analyzed to become perfectly clear, and we doubt whether it could be recast in a more lucid form.

PUNISHMENTS FOR OFFENCES AFFECTING LIFE.

303. With respect to the punishments for murder, viz. death, or transportation for life, or rigorous imprisonment for life, to which fine may be added, Mr. Hudleston says—"I prefer the provisions of our Re-"gulations, which define the grounds for mitigating the capital punish-"ment." He does not specify the provisions which he had in his mind. In the general law relating to murder in the Madras Regulations, which Mr. Hudleston must be understood to refer to, there is no such definition: but a discretion is given to the Judges not to pass sentence of death, if there appear to them to be "alleviating circumstances" in the case—a discretion sufficiently arbitrary.

Reg. VIII. of 1802, Sec. 15.

304. Mr. Hudleston objects to the punishment for manslaughter as too severe: but the maximum punishment for this offence by the Code is imprisonment for fourteen years, while the law of the Madras Presidency, *authorizes* imprisonment for *life* in cases of culpable homicide not amounting to wilful murder, although seven years is the ordinary limit. The law was the same in Bengal till 1825, when seven years was fixed as the maximum limit. The law of Bombay limits the term of imprisonment to ten years, and Mr. Greenhill, one of the Judges of the Sudder Court at that Presidency, expresses his opinion that the extreme punishment proposed by the Code is unnecessarily severe. The Judges of the Sudder Court, North Western Provinces, observe, that the penalties laid down for "culpable homicide by consent," and "in defence," are heavier than our Courts "have been accustomed to inflict for the same sort of "offence," but that they are unwilling to designate them as too severe without having before them the Code of Procedure.

Madras.
Reg. VII. of 1802, Sec. 15, Cl 2, corresponding with Sec. 3, Reg. IV. of 1797, and Sec. 15, Cl. 2, Reg. VII. of 1803, of Bengal.
Bengal.
Reg XII. 1825, Sec. 7, Cl 1.
Sec. 27, Reg. XIV of 1827, of Bombay

Cl. 302 and 303.

305. Mr. A. D. Campbell, of the Madras Sudder Court, thinks the penalty in all the Clauses 301 to 303, but particularly in Clause 303, is too severe, and that too much discretion is left to the Judges.

306. Mr. J. F. Thomas, of the Madras Presidency, with reference to the same Clauses, says "It would be well I conceive if some rule were "laid down which should distinguish cases where persons guilty of "voluntary culpable homicide may be, comparatively, but little to blame, "from cases which come within a shade of murder. The provisions as "they now stand in the case of manslaughter and homicide in defence, "are, I think, open to the objection, that the same measure of penalty "may be inflicted on the least as on the most aggravated case, and all is "left to the discretion of the Judges. Is this latitude necessary or "expedient?"

307. Colonel Sleeman adverting to the provision of Clause 302, which prescribes two years as the minimum of imprisonment to which a person convicted of "voluntary culpable homicide by consent" shall be sentenced, advises that this restriction be omitted, and that the offence be put exactly upon the same footing as the other mitigated forms of voluntary culpable homicide in Clauses 301 and 303. It appears to us however, referring to the strong opinions against permitting the consent of the person who has suffered death to be a ground of mitigation at all, that the distinction which has been made, by prescribing the minimum above mentioned, is judicious.

308. The discretion to be vested in the Judges in meting the punishment for offences, and the fitness of the scale of penalties to be applied by them, are general questions which fall to be considered in treating of the Chapter of punishments. We shall only say here that it does not appear to us that the penalties in the Clause we have been considering are out of proportion with reference to the scale which seems to have been generally kept in view, or that a greater latitude of discretion has been given to the Judge in this than in other parts of the Code.

HOMICIDE CULPABLE YET NOT VOLUNTARY.

309. We come now to Clause 304, which provides for death caused by any act or illegal omission "so rash or negligent as to indicate a "want of due regard for human life," described in the Note as homicide "culpable yet not voluntary." The next Clause 305, provides for cases in which the act or illegal omission which caused death is a distinct offence by itself. In such cases the punishment of the distinct offence is to be added to that prescribed by Clause 304 for the negligent causing of death. The definition in Clause 304 appears to include the cases described in the 2d* and 3d† Clauses of the Article which contains the definition of manslaughter in the Digest prepared by Her Majesty's Commissioners on Criminal Law, the cases in the 1st Clause of that Article being those to which the definition of manslaughter is confined by Clause 297 of this Code.

* "Where death is occasioned not wilfully but "culpably through want of "reasonable care and caution."

† "Where death is occasioned not wilfully, but in "consequence of any unlawful violence, or injury "to, or endeavor to injure "the person of any other." Chap. XV. Sec. 3, Art. 2.

310. The Indian Law Commissioners observe that "there will "probably be little difference of opinion as to the expediency of provid- "ing a punishment for the rash and negligent causing of death. But it "may be thought that we have dealt too leniently by the offender who "while committing a crime causes death which he did not intend to "cause or know himself to be likely to cause." Page 63.

"The law as we have framed it differs widely from the English "law. 'If,' says Sir William Blackstone, 'one intends to do another "'felony and undesignedly kills a man, this is murder,' and he gives the "following illustration of the rule—'If one gives a woman with child a "'medicine to produce abortion, and it operates so violently as to kill "'the woman, this is murder in the person who gave it.'"

"Under the provisions of our Code, this case would be very differ- "ently dealt with according to circumstances. If A kills Z by adminis- "tering abortives to her with the knowledge that those abortives are "likely to cause her death, he is guilty of voluntary culpable homicide, "which will be voluntary culpable homicide by consent if Z agreed to "run the risk, and murder if Z did not so agree. If A causes miscarri- "age to Z not intending to cause Z's death, nor thinking it likely that "he shall cause Z's death, but so rashly or negligently as to cause her "death, A is guilty of culpable homicide not voluntary, and will be "liable to the punishment provided for the causing miscarriage, increas- "ed by imprisonment for a term not exceeding two years. Lastly, if A "took such precautions that there was no reasonable probability that "Z's death would be caused, and if the medicine were rendered deadly by "some accident which no human sagacity could have foreseen, or by some "peculiarity in Z's constitution such as there was no ground whatever "to expect, A will be liable to no punishment whatever on account of "her death, but will of course be liable to the punishment provided for "causing miscarriage."

311. The Commissioners offer arguments in defence of this part of the Code. Supposing "it will be admitted that, when an act is in itself "innocent, to punish a person who does it because bad consequences "which no human wisdom could have foreseen have followed from it, "would be in the highest degree barbarous and absurd," they ask, if the act be itself a high offence, ought that circumstance alone to make the person punishable for the consequences of his misfortune—to be liable, for example, to the punishment of murder if death was the issue of it? They argue that it ought not—that to pronounce a man guilty of an offence because a misfortune befell him while he was committing Page 64.

another offence, is to confound all the boundaries of crime. Proceeding with their argument they observe, that " to punish as a murderer every " man who while committing a heinous offence causes death by pure " misadventure, is a course which evidently adds nothing to the security " of human life." " The only good effect which such punishment can " produce will be to deter people from committing any of those offences " which turn into murders what are in themselves mere accidents. It is " in fact an addition to the punishment of those offences, and it is an " addition made in the very worst way." They conclude " that when " a person engaged in the commission of an offence causes death by pure " accident, he should suffer only the punishment of his offence without " any addition on account of such accidental death."

312. Upon this subject the English Law Commissioners make the following remarks in their 4th Report: " It may be very questionable " whether, in point of principle, an effect wholly unexpected, and un- " connected with the intention and act of the party, except by accident, " can properly be made the foundation of criminal responsibility; for " as the object of punishment is the prevention of crime, it ought " properly to be annexed to such acts as are in themselves culpa- " ble by reason of their mischievous tendency, and the intention with " which they are done, and not to such as are simply accidental and " unintentional. By the law of England this doctrine is in many in- " stances reversed, and the criminal intention incident to the act intend- " ed but not perpetrated, or not in question, is supposed to be transfer- " red to the act which was the mere accidental consequence. Thus a " party doing the same act in the same manner, but who by mere accident " and not through want of caution, kills another, may be, according to " his intention in doing that act, though such intention be wholly uncon- " nected with the accidental result, guilty either of murder where his in- " tention was to commit a felony, or of manslaughter where his intention " was to commit a bare misdemeanor or trespass, or an act *malum in se*, " or purely innocent, where the act, although unlawful, was merely " *malum prohibitum*." After giving examples illustrative of the impropriety of the English law in this respect, they say in conclusion— " whilst we think that a mere accidental killing in the endeavor to do an " illegal or criminal act, wholly unconnected with any danger or mischief " to the person cannot on any just principle be brought within the scope " of the law of murder, it appears to us that the same objections do not " apply, or at all events, do not apply with the same force, to the case " where death is occasioned in the endeavor to commit a crime with " violence to the person or habitation of another, and consequently " is attended with some degree of risk to the person, although it may

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" not be so great as to constitute murder without resorting to the con-
" sideration of the offender's intention. For here the result is not
" a matter of pure accident wholly unconnected with the criminal intent,
" and consequently the enhanced punishment is justified by one of the
" main principles of Penal Laws, namely, the prevention of crimes
" of violence attended with danger to the person." In the 7th Report
however they retract this qualification, and express a positive opinion
that " the intent to commit a minor crime ought not in any case by Page 28.
" reason of a purely accidental consequence to be deemed equivalent for
" penal purposes to a wilful causing of that consequence." Thus the
English Commissioners arrived in the end at the same conclusion with
the authors of the Indian Penal Code; and they modified their definition
of wilful killing accordingly by omitting after the words "to kill," the
words "or do great bodily harm," which stood in the Draft contained
in their 4th Report, according to the view *then* entertained by them, as
expressed in the above quotation. The provisions on this subject in Mr.
Livingstone's Code are also, as observed by the Indian Law Commis-
sioners, framed on the same principles, though they differ in details from
those under consideration.

313. Mr. Norton says of Clause 304, that he considers the provi-
sion contained in it to be just and expedient, but that he is quite unable
to reconcile it with Clauses 69 to 72. He does not however point out
any inconsistency, and we cannot conjecture what he alludes to.

314. Although he approves of Clause 304, Mr. Norton says " when
" I find under the next Clause and its illustration that killing in the
" attempt to commit a rape is a specimen of this rash and negligent
" way of killing, and that such offence, with certain exceptions, is to be
" punished as a combination of two offences, and either to be doubly
" punished, or punished by substitution of the punishment attached to
" the commission of the crime attempted, I am lost in confusion and
" uncertainty. I have equal difficulty in learning what the law is, and
" how to apply it." We think that Mr. Norton could hardly have been
left in such perplexity, if he had considered the enactments here in question
with due attention. He would have understood that Clause 304 provides
for a case in which death has been caused by culpable rashness, or negli-
gence, *not* in committing or attempting to commit an offence, while
Clause 305 provides for the aggravated case of death so caused, in com-
mitting or attempting to commit an offence. In the latter case the
punishment is to be that prescribed for the offence committed or attempt-
ed, with the punishment of involuntary culpable homicide (Clause 304)
superadded. If the attempt be an offence by itself, it is explained that

still the punishment of the *offence attempted*, and *not* the punishment *of the attempt* is to be awarded. We see no confusion or uncertainty here; but enactments so clear and intelligible as to leave no excuse for error in applying them.

315. Mr. Norton apparently finds fault with the illustration under Clause 305, namely, the case of a man attempting to commit a rape on a woman, and in the attempt involuntarily causing her death. Here the death of the woman being, to use the words of the English Commissioners, " an effect wholly unexpected and unconnected with the " intention and act of the party, except by accident," is a homicide, which though culpable is not voluntary, and therefore does not fall under the definition of murder in this Code, nor under that proposed by the English Commissioners in their Digest; the homicide is culpable, because the circumstances evince on the part of the offender " a want of due re- " gard for human life." On this ground the culprit is punishable, while he is punishable also for the crime which he intended to perpetrate, that is rape. Under this double liability he may be sentenced to rigorous imprisonment for a period extending to 16 years.

316. Mr. Norton does not explain particularly why he objects to the illustration, or how he thinks the case ought to be treated. Mr. Hudleston objects to the illustration " as a violation of all sound principle." " By the law of England," says he, " the act is " murder, and so it ought to be." This objection founded on the authority of the law of England may be considered sufficiently answered by the observations we have quoted from the English Law Commissioners.

317. Mr. Pyne observes, " It is possible to conceive circumstances " under which the ravishment of a delicate woman would in all proba- " bility be attended with fatal consequences; and instances are not want- " ing where brutal excitement has led a plurality of ravishers to violate " a woman. To cause death by such means appears to me an offence " equally grave with culpable homicide. Take for example a rape com- " mitted on an infant 6 or 7 years of age from which death ensues; a " recent case of this kind has come before the Courts." It is clear that the case here last mentioned would fall under voluntary culpable homicide, because it would be a just inference from the circumstances that the offender knew he was likely by his brutal act to cause the death of the infant; and wherever the circumstances justified such an inference the offender ought to be charged with murder.

318. Referring to the words " an offence *other than the offence* " *defined in Clause* 327," which appear in Clause 305, Sir H. Seton questions the propriety of " defining an offence by reference to another, " not specifically, but as contained in a subsequent Section of the Code," and Colonel Sleeman suggests that the words in Italics should be omitted. They might be omitted without affecting the definition, for it is clear enough that the offence described in Clause 327 is but a lesser degree of that to which Clause 304 applies, and of course merges in the latter. The words appear to have been introduced to guard against even the semblance of inaccuracy.

319. Mr. G. W. Bacon thinks there are many cases of homicide in perpetration of another offence that have no connection with " pure accident," or " rashness, or negligence," and taking such to be murder, as being attended with violence, he would punish them accordingly. Upon this we have to observe, that when homicide is committed in the perpetration of another offence, if it is not accidental nor attributable to rashness or negligence, it must fall within the definition of voluntary culpable homicide, and will be punishable as murder, as Mr. Bacon thinks it should be.

320. Mr. A. D. Campbell observes that he can no where discover in the Code the provision for death by pure accident alluded to in Note M. p. 65. There is no such provision in the Code, and none is required. It is unnecessary to declare formally that an act purely accidental is not an offence, if the definitions are so framed, as we believe they are, that the effect of a mere accident cannot be charged as an offence.

321. Upon Clause 306, relating to the abetment of suicide committed by a child under 12 years of age and others incapable of rational judgment, Mr. J. F. Thomas says, " The inducement to commit the " offence here pointed out must be in the ordinary course of events so " exceedingly slight, that it scarcely seems necessary to place the offence " on a level with the most atrocious murder, and annex the penalty of " death, &c. It would in practice probably be found that a less penalty " than death would be sufficient to check the commission of the crime." Upon Clause 307 relating to the abetment of suicide in general, he says, " I greatly doubt the necessity of such heavy penalties to repress the " offence. Five years imprisonment where fine is imposed, I should con- " sider ample, and better adapted to the character of the offence in the " existing state of society. If the rule ' to do an act (Clause 24) de- " ' note omission' is to be applied largely to this Clause, it will require " great modification in my opinion, for the instances of suicide which

" might be prevented by persons are numerous ; and at present they " have not the most remote idea that they are acting criminally, and " abetting a penal act by such omission. They ought not therefore to be " liable to the heavy penalties here provided."

322. These Clauses refer to abetment " by aid," the definition of which contained in Clause 97, shews that the offence consists in a person " doing any act or omitting what he is legally bound to do with the *in-* " *tention* of aiding," &c. The question to what extent *omissions* ought to be made punishable when they produce, are intended to produce, or are known to be likely to produce the same evil effects as *acts*, is discussed in the Note to the Chapter under consideration. The conclusion is that such omissions, if they are illegal according to the explanation of that term in Clause 28, ought to be punished in the same manner as acts, and this is the rule of the Code. It seems to us that the rule would fall to be applied under these Clauses chiefly in such a case as this, where a person legally bound to take care of the person of another has by an illegal omission of his duty *intentionally* given him the opportunity, or permitted him to obtain the means of killing himself.

323. It would apply also, we conceive, in the case of a person seeing another preparing to destroy himself, say by hanging, and allowing him to accomplish his purpose without any attempt to prevent him, if as may be expected, the law of procedure makes it a common duty incumbent upon all men to assist in preventing offences about to be committed in their presence. The intention here would be inferrible from the circumstances. In the former case collateral proof of the intention would be requisite. But we apprehend that it is *active* aid which is principally intended in these Clauses, and to which the higher penalties are meant to be applied.

* 2nd Proviso.

324. Clause 306 corresponds with Clause 298* inasmuch as the latter excepts from its provisions the same classes of persons as are mentioned in the former, and leaves the offence of causing the death of such persons, though with their consent, to be dealt with as murder; so Clause 306 attaches the penalties of murder to the offence defined therein. We have the same remarks to make here as are made upon Clause 298, as to the age of 12 years being fixed absolutely as that under which a child is to be taken as incapable of forming an intelligent judgment.

325. Clause 307, again, corresponds with Clause 298 in attaching to the offence defined in it, which is closely allied to 'culpable homicide by consent,' the same punishments as are applicable to the latter.

326. In concluding our review of the provisions regarding "offences affecting life," we think it proper to notice a point on which there is a difference of considerable importance between the law of England and the Indian Code.

327. "The law" (of England) "takes no cognizance of homicide "unless the party injured die of the injury within one year and a day "thereafter." There is no such limitation in the Indian Code.

Digest, Chapter XV., Sec. 1, Art. 7.

328. In their 4th Report the English Criminal Law Commissioners observe upon the above rule, which they characterise as arbitrary, that "it cannot but be regarded as some sacrifice in point of principle, to "allow a murderer to escape, merely because the deceased, from natural "strength of constitution, or from accidental circumstances connected "with the injury, happened to linger for more than a year." They did not however "consider themselves to be justified in suggesting any al- "teration of this ancient rule," remarking that they were not aware that any practical inconvenience had resulted from it.

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329. We find that in an early draft of the Indian Code there was a limitation. The reason for abandoning it is not recorded, but we may conjecture that it was deemed objectionable on account of "the sacrifice in point of principle" which it involves. Probably the English Criminal Law Commissioners would have thought this a sufficient reason for not admitting a limitation, if it had not been for the "ancient rule." There is no limitation in the Regulations of Bengal and Madras; but the law of Bombay bars the charge of murder if death does not take place within six months.

330. We are decidedly of opinion that it is not advisable to follow the English law in admitting a limitation which is confessedly objectionable in principle, and which would be new in India, except within the Presidency of Bombay and the jurisdiction of Her Majesty's Courts.

331. In explanation of the provisions contained in Clauses 308 and 309, the Commissioners make the following observations: "These "Clauses appear to us absolutely necessary to the completeness of the "Code. We have provided, under the head of bodily hurt, for "cases in which hurt is inflicted in an attempt to murder; under the "head of assaults for assaults committed in attempting to murder; under "the head of criminal trespass, for some criminal trespasses committed "in order to murder. But there will still remain many atrocious and "deliberate attempts to murder which are not trespasses, which are not

ATTEMPTS to commit voluntary culpable homicide.

Note p. 66.

" assaults, and which cause no hurt. A, for example, digs a pit in his " garden and conceals the mouth of it, intending that Z may fall in and " perish there. Here A has committed no trespass, for the ground is his " own; and no assault, for he has applied no force to Z. He may not " have caused bodily hurt, for Z may have received a timely caution, or " may not have gone near the pit. But A's crime is evidently one " which ought to be punished as severely as if he had laid hands on Z " with the intention of cutting his throat."

332. Again they say, "similar attempts may be made to commit " voluntary culpable homicide in any of the three mitigated forms. A, " for example, is excited to violent passion by Z, and fires a pistol intend- " ing to kill Z. If the shot proves fatal, A will be guilty of man- " slaughter, and he surely ought not to be exempted from all punish- " ment if the ball only grazes the intended victim."

" It is to meet cases of this description that Clauses 308 and 309 are intended."

333. Sir R. Comyn, Mr. Norton, Mr. Hudleston, and Mr. James Thomas object to the phraseology of these Clauses as vague and obscure. Sir R. Comyn particularly observes " that carrying an act or omission " to the length the offender *contemplates*, as sufficient to cause death," is a mode of expression utterly destitute of legal precision.

334. Mr. Hudleston says he cannot perceive the necessity of either of these provisions. His colleague Mr. A. D. Campbell, on the contrary, thinks them fully justified by the reasons given in the Note, but he considers it " desirable that they should if possible be made less obscure."

335. Colonel Sleeman proposes to substitute the word "considers" for " contemplates" in the passage referred to by Sir R. Comyn. And observing that " the door of repentance should be kept open as long as " possible in law, as well as in religion," he suggests the addition of the following words—" and does not himself repent and interpose to save " the intended victim from the consequences of that act or omission."

336. Mr. Greenhill observes with reference to Clause 309, that the terms " voluntary culpable homicide" used therein include murder, which the illustrations show was not intended.

337. It is clear from the note as well as from the illustrations, that Clause 309 was meant to apply to attempts to cause death under circumstances which if death ensued would make the offence to be voluntary

culpable homicide of one of the mitigated descriptions specified in Clause 295, attempts to commit murder being provided for expressly by Clause 308, and it appears to us to be advisable to declare this by introducing after the words "voluntary culpable homicide," the words "of one of the three "mitigated descriptions enumerated in Clause 295," or inserting instead of "he would be guilty of voluntary culpable homicide," "he would be "guilty of manslaughter or voluntary culpable homicide by consent," or "voluntary culpable homicide in defence."

338. As to the word "contemplates," which is thought not to be sufficiently precise, it does not appear to us that the meaning is at all doubtful, or that it would be made clearer by adopting Colonel Sleeman's suggestion. We do not think it necessary to alter this word or otherwise to change the phraseology of these Clauses (except as above suggested in Clause 309,) with a view to elucidation and precision. It appears to us that with the aid of the illustrations the sense can scarcely be mistaken by any one of ordinary understanding giving his mind fairly to the consideration of the subject.

339. By Clause 308, a person attempting to commit murder though he fail in his purpose, if he shall have taken all the steps, which according to his plan were necessary to accomplish it, will be punishable with transportation for life, or imprisonment for life, or for a term not less than seven years, and also by fine. This Clause is applicable to cases in which no harm is done. Where bodily hurt is inflicted in such an attempt, the offence will be liable to the same punishment, but under a different Clause,* and so in cases of assault† and trespass.‡

* 320. † 343. ‡ 429.

340. Under the law of England as it stands at present, attempts to commit murder, although no bodily injury be inflicted, are punishable with transportation for life, or for any term not less than fifteen years, or imprisonment for any term not exceeding three years. The Criminal Law Commissioners have recommended that the minimum of transportation be reduced to seven years.

Digest Chapter XV. Sec. 5, Art 3.

341. By Clause 309, attempts to cause death under circumstances which would reduce the offence, if the object were accomplished, to one of the mitigated forms of voluntary culpable homicide, carried to the same point as specified in Clause 308, will render the offender liable to be punished with imprisonment for a term which may extend to three years, or fine or both. If killing a person in a duel fall under Clause 298, then any person shooting at another in a duel, we apprehend, will be within this Clause, whether the other be wounded or not.

342. In the Digest of the English Criminal Law Commissioners it is proposed that whoever shall by any means whatever wilfully endanger the life of any person shall be liable to imprisonment for a term not exceeding three years, or fine, or both.

343. "Although no evil effect be produced" (say Her Majesty's Commissioners) "yet criminal endeavors consisting in manifest overt "acts ought justly to be dealt with as penal." This is the principle upon which the provisions in question are founded.

344. With respect to the amendment proposed by Colonel Sleeman with the view of saving a person who having laid a plan of murder repents, as in the example of A intending to murder Z by means of a spring gun (in the illustration (*a*) subjoined to Clause 308), if A after setting the gun repents and removes it, we are of opinion that it is unnecessary, for in the case supposed we apprehend that without the words proposed to be added, A would not be chargeable under Clause 308. The last act undoing the previous act, he could not, we conceive, be charged with that previous act as an offence, unless for anything he knew it might have had effect in the mean time. For example, if A set the spring gun in the morning expecting that Z would pass the place in the afternoon and knowing that he could not pass before noon—in this case if A repenting of his purpose removed the spring gun before noon, that is, before it was possible it could have effect, it appears to us that the last act would exonerate him; not so, if he only knew that Z was to pass sometime in the course of the day, it might be the same hour, and that it was a mere accident that he did not pass before he removed the spring gun. In the former case he kept it in his power to prevent the mischief intended and did take the necessary step to prevent it in time.

Clauses 310 and 311. THUGGEE.

345. The act of the Indian Legislature No. XXX. of 1836, made it an offence punishable with imprisonment for life with hard labour to have belonged to a gang of *Thugs*. In the first of these two Clauses it is explained that "whoever belongs or has at any time belonged to any "gang of persons associated for the purpose of gaining a livelihood by "inveigling and murdering travellers in order to take the property of "such travellers, is designated as a 'Thug.'" In Clause 311 it is prescribed that a Thug shall be punished with transportation for life, or imprisonment of either description for life, and shall be also liable to fine.

246. Mr. Greenhill thinks that the words "gaining a livelihood" in Clause 310 are "unnecessary and objectionable," and it seems to us that their introduction imposes a restriction not within the intention of

the Legislature in the laws passed on this subject just before and after the date of the Code. It appears therefore to be a question for the consideration of Government whether they should be retained. It may be better to insert the word "habitually" before "associated" and to omit the words between "of" and "inveigling." We are not aware why transportation for life was not authorized in Act XXX. of 1836, and no reason occurs to us for excepting "Thugs" in particular from this mode of punishment which is prescribed generally for offences of the same degree.

OF THE CAUSING OF MISCARRIAGE.

347. Clauses 312 and 313 contain provisions on the subject of abortion. By the former the woman herself if she voluntarily cause herself to miscarry, and every person who voluntarily causes a woman to miscarry, except for the purpose of saving her life, is liable to punishment. The law of England does not punish the woman; and she is not punishable by Mr. Livingston's Code. The woman is punishable by the French Code.

Note M. p. 66.

348. The framers of the Indian Code themselves express apprehensions that their provisions, or any other provisions on this subject, may be abused in this country to the vilest purposes, and they say that if they cannot in the Code of Procedure lay down rules to prevent such abuse they are inclined to think it would be their duty to advise that the offence of abortion, where the mother is a party to it, should be left wholly unpunished, rather than it should be repressed by provisions which would occasion more suffering to the innocent than to the guilty.

349. Mr. J. F. Thomas says of Clause 312— "This Clause appears "to me to confound offences distinct in themselves, and which should "not be visited by a like measure of punishment."

"The high caste young widow, who, to hide her shame, should "at the risk of life cause herself to miscarry does not, under the "peculiar circumstances in which she is placed by the institutions of "society, commit an offence in any respect of like criminality with "the seducer of a young girl, or married woman, who to cover her "crime should cause such woman to miscarry. The offences are so dis-"tinct that I think separate and special provisions should be made for "them. In the one instance a penalty of not less than two years would "only meet the case; in the other a trifling punishment in addition "to the degradation of a criminal trial would be ample. I much doubt "the policy of providing heavy penalties for the repression of the offence "of causing miscarriage by the woman herself, whilst the barbarous

" institutions of the country create the offence. My experience would also " lead me to propose that miscarriage should be defined. I have known " groundless and false charges of this nature brought and the parties " exposed to the pain of a criminal investigation, when there was " no evidence whatever as to the existence of the fœtus, and it was not " established therefore that the woman was with child, or that there had " been an abortion. 'Every woman being with child' may open the door " to vexatious accusations. I would throw on the accuser the onus " of establishing in limine that the fœtus was distinctly formed and " manifest on its abortion, before the charge of causing miscarriage " should be entertained. If this was not alleged in the charge it should " not be held that 'the woman was with child';—an explanation might " be added that to be with child in the eye of the law, the charge must " allege the abortion of a fœtus fully formed."

350. Mr. Hudleston observes that the remarks of Mr. Thomas appear to deserve consideration, in which Mr. A. D. Campbell concurs. Mr. Sharkey and Mr. Greenhill suggest that it should be specified that the woman was "quick with child." Mr. Sharkey opposes Mr. Thomas's views generally and particularly in regard to the punishment proposed, which he thinks by no means sufficient, as the offence is often little short of murder.

351. Mr. James Thomas also considers the punishment inadequate. Mr. Pyne says, " This is one of those offences which if death takes place " it is difficult to distinguish from murder. I do not consider that the " combined penalties provided in Clause 312 and in Clause 304 are suffi- " cient to ensure that degree of caution which the preservation of human " life demands." Referring to Clause 313, he observes that " the offence " here is of a deeper dye, and yet if not aggravated by hurt is not liable " to greater punishment. It might without undue harshness be doubled."

352. We apprehend that an attempt to procure abortion issuing in the death of the woman may sometimes fall under " homicide by consent" and sometimes under "murder" according to the circumstances, where it appears that the party making the attempt knew from the condition of the woman or otherwise that it was likely to cause her death.

Vide Note M p 63.

353. As to the Clause 313, we conceive that generally some hurt will be caused which will afford ground for enhancing the punishment.

354. Colonel Sleeman says—" The evils inflicted upon society in " India by the police under the power invested in them by this law are " so very great, and must unavoidably continue to be so if it remains

" in force, that I should certainly expunge it from the Code. I would " merely enact 312 : ' Whoever voluntarily causes a woman with child " ' to miscarry without her free and voluntary consent, except in good faith " ' for the purpose of saving her life, shall be punished with impri- " ' sonment of either description for a term which may extend to three " ' years, or to fine, or both.' To this should be added the cumulative " Clause." '

355. We are on the whole inclined to support Colonel Sleeman's suggestion, but it seems to us that it will be sufficient to omit from Clause 312 the words before " every person" and to let the rest stand. The next Clause 313 may be left unaltered.

356. By Clause 314 it is explained that " all bodily pain, disease, " and infirmity, is designated as ' hurt.' " Of Hurt.

357. " We have found it," say the authors of the Code, " very diffi- " cult to draw a line between those bodily hurts which are serious and " those which are slight. To draw such a line with perfect accuracy is " indeed absolutely impossible ; but it is far better that such a line " should be drawn though rudely, than that offences some of which ap- " proach in enormity to murder, while others are little more than frolics " which a good-natured man would hardly resent, should be classed " together." Note p. 67

" We have therefore designated certain kinds of hurt as ' grievous.' "

" We have given this name to emasculation,—to the loss of the " sight of either eye,—to the loss of the hearing of either ear,—to the " loss of any member, or joint,—to the permanent disfiguration of the " head, or face,—to the fracture or dislocation of bones." And " after " long consideration, we have determined to give the name of grievous " bodily hurt to all hurt which causes the sufferer to be in pain, diseased, " or unable to pursue his ordinary avocations, during the space of 20 " days." Clause 315.

" What we propose is that the voluntary infliction of simple bodily " hurt shall be punished with imprisonment of either description which " may extend to one year, or fine, or both; the voluntary infliction of " grievous bodily hurt with imprisonment of either description for a term " which may extend to ten years and must not be less than six months, to " which fine may be added." p 68. Claus 318. Claus 319

"These are the ordinary punishments. But there are certain "aggravating and mitigating circumstances which make a considerable "difference."

Clause 320.
Clauses 321, 322.
Clauses 323, 324.

358. The aggravated cases are hurt, in an attempt to murder; hurt, simple and grievous for the purpose of extortion; hurt simple and grievous by means the use of which generally indicates great malignity, as by a sharp instrument, fire, or any heated substance, or by any corrosive or explosive substance, or by poison, or by means of any animal. There is no distinction of simple and grievous hurt in the case of an attempt to murder. "It does not appear to us," say the Commissioners, "that where the murderous intention is made out the severity "of the hurt inflicted is a circumstance which ought to be considered in "apportioning the punishment, though it is undoubtedly a circumstance "which will be important as evidence."

Note p 69.

359. Referring to Clauses 321 and 322 they say, "We propose "that when bodily hurt is inflicted by way of torture the punishment "shall be very severe. In England happily such a provision would be "unnecessary. But the execrable cruelties which are committed by "robbers in this country for the purpose of extorting property, or infor-"mation relating to property, render it absolutely necessary here."

Clauses 325, 326

360. The cases of mitigation are those in which the hurt is caused on grave and sudden provocation. The principles on which the Clauses providing for such cases are framed are the same as those on which the law of Manslaughter is framed.

Clauses 327, 328

361. For hurt caused involuntarily, but culpably, the rules provided bear a close analogy to those provided for cases of involuntary culpable homicide.

Clause 329

362. And there is a provision corresponding in principle with that contained in Clause 308, for attempts to cause hurt not punishable as assaults, by which the offender is made liable to imprisonment for half the term to which he would have been liable if he had actually caused the hurt intended.

363. Mr. Hudleston observes of Clause 314 that it "is open to the "objection of giving to a word a meaning not its own." The word of which this is said is "hurt." Mr. Hudleston appears to object to its including "*all* bodily pain, disease, and infirmity;" and it must be acknowledged that this is a very wide definition, comprehending pain, disease, and infirmity resulting from natural causes, or from "the visita-

tion of God in a natural way," as well as pain, &c. caused by the act of man. But there can be no misapprehension in consequence, as in defining subsequently the offences which consist of hurt, the application of the term is practically limited to hurt caused by the act or omission of man.

364. Of Clause 315 Mr. Hudleston says, "I consider this Clause "as marked by needless particularity; it is a part of the system adopted "in this work to which I have stated my objections of attempting to "define every possible act of criminality. Mr. J. F. Thomas points "out omissions in the specifications which are instances of the mischief "of the principle." He adds—"The provisions connected with this "Clause appear to me also to overload the Code with unprofitable "verbiage in amplification and particularization quite uncalled for. I "allude to the Clauses to 329 inclusive."

365. It is to be regretted that Mr. Hudleston did not, like Mr. J. F. Thomas, apply himself to the consideration of the specifications contained in Clause 315 with a view to point out such defects as he could discover in order that the Clause should be made as perfect as possible, rather than content himself with suggesting the possibility of mischief occurring in practice from some undetected omission, without, as far as appears, having found any ground for the surmise. This remark applies to many of the general observations of Mr. Hudleston. It would have been better also, we think, if, instead of generally condemning the Clauses to 329 inclusive as quite uncalled for, Mr. Hudleston had shewn how they might have been dispensed with, without leaving those offences which fall under the definition of hurt, and do not also fall under the head of assault, exempt from punishment. The reasons for introducing these Clauses into the Code, which are stated in the Note to this Chapter, Page 67. are not noticed by Mr. Hudleston.

366. Mr. Norton says—"I concur in the definitions of what shall "be grievous hurt and the expediency of making them." But speaking of the provisions regarding personal injuries in general, which compose the remainder of this Chapter, he makes the following remarks: "When "abstract rules of qualification of all sorts of offences against the person "by assault, imprisonment, or by other injury, only to be understood and "applied by reference to explanations and illustrations, shall be attempt-"ed to be put in practical operation, I can surmise all sorts of difficul-"ties and misconceptions and arbitrary constructions as likely to arise." "I might expend pages in exhibiting instances," he says, but he exhibits not one; and with the above summary remark he passes over all the

detailed provisions regarding "hurt," (316 to 329) the definitions of "wrongful restraint and wrongful confinement," "assault," "kidnapping," "rape," and "unnatural offences," and the provisions for the punishment thereof, (330 to 362).

367. The following are the observations of Mr. J. F. Thomas referred to by Mr. Hudleston. Upon the first head in Clause 315, he says—"to emasculation I would add, or injury to the membra privata. "In this country the enormities which appear in cases where dancing "girls have been parties, and in robberies where the object has been not "to injure so much as to force through fear confession of concealed "property, appear to me to require this addition. For whether the "wounds, or the injury actually received, are trifling and do not "amount to hurt, as defined under "eighthly," this act ought still, I "think, to be repressed by severe penalties, as peculiarly offensive to the "feelings of the party injured, as well as most dangerous—the slightest "excess causing the severest suffering." Upon the words "dislocation "of any bone other than a tooth," in the seventh head, he says, "This "would not provide for a class of cases which came before me in the "Northern Division, where the sufferers had the *whole* of their teeth "forcibly removed; and I am not clear that the offence could be brought "under any of the prior provisions."

"To meet the case I would suggest an explanation to the effect "that the removal of the whole, or the greater part of the teeth, "permanently weakening the powers of the jaw, does not come within "the provision for fracture or dislocation of a bone other than a tooth; "but under the preceding head, the sixth."

368. Mr. A. D. Campbell supports the suggestion of Mr. Thomas regarding the first head in this Clause, observing that some horrible cases occur to his recollection evincing the propriety of it. Mr. Campbell also supports the suggestion of Mr. Thomas regarding the seventh head, remarking that it is the native mode of depriving a conjuror of his art to knock out all his front teeth, deemed indispensable to the due pronunciation of his incantations.

369. We are inclined to think that the addition to the first head proposed by Mr. Thomas is unnecessary, seeing that when this barbarous kind of hurts is caused for the purpose of extortion, &c. as in the cases alluded to by Mr. Thomas, it is punishable severely under Clause 321; and there being no ground, as far as we know, to believe that it is an offence of which there has been such experience under other circumstances as to call for its being distinguished specially.

370. With respect to the seventh head which excepts the fracture or dislocation of a tooth, we observe that "striking out the *fore tooth*" is included in the definition of maiming in the Digest of the English Criminal Law Commissioners, which also includes the kinds of hurt described under the first, second, fourth, fifth, and seventh heads. We apprehend that the case stated by Mr. Thomas of the forcible removal of the *whole* of the teeth falls under the fifth head as "permanently impairing the "powers of a member or joint," that is to say, the jaw, and that the fracture or dislocation of several teeth would properly be treated as an offence under the same head; but it seems to us that it would be better to specify this kind of hurt under the seventh head. We would not designate the fracture or dislocation of a single tooth, even the fore tooth, as grievous hurt, but when more than one tooth is removed by violence the case may be considered as aggravated as the fracture or dislocation of one of the small bones. We would therefore add to the seventh head the words "or of two or more teeth."

371. The Commissioners have taken some pains to explain the grounds upon which they framed the definition under the eighth head in this Clause, by which a hurt whereby the sufferer is in pain, or diseased, or unable to follow his ordinary pursuits, during the space of twenty days, is designated as grievous. The provision they state was suggested by Article 309 of the French Code. Thinking that the length of time during which a sufferer is in pain, diseased, or incapacitated from pursuing his ordinary avocation, though a defective criterion of the severity of a hurt, is still the best criterion that has ever been devised, they adopted it from the above Article, but they framed their penal provisions on a principle quite different from that by which the authors of the French Code appeared to have been guided, taking into consideration both the extent of the hurt and the intention of the offender. This will be found explicitly declared in the explanation to Clause 317.

Note p 67, 68.

372. Mr. Pyne objects to the definition of grievous hurt with reference to the second head in Clause 76 relating to the right of private defence, thinking that it allows too great a latitude to suffer a person to resist to the death from fear of receiving an injury which may render him unable to follow his ordinary pursuits for twenty days. Again he observes that a very trifling injury to hand or foot may prevent a clerk or laborer from following his ordinary pursuits for twenty days. Mr. Boldero also remarks that the provision is likely to work unequally, as one may from the nature of his pursuit be more easily disabled than another. Mr. Sharkey observes that the specification of twenty days is likely to lead to arbitrary sentences. Mr. H. Frere thinks that making the time of incapacity from work the test of whether a hurt is grievous, is inap-

plicable to India, where artificial means are constantly resorted to to disguise the real state of the case, and where medical assistance to find out the truth is frequently not procurable.

373. The words "grievous bodily harm" are used in the English Statutes and in the Digest of the English Criminal law along with "maim" "disfigure" and "disable," but while the term "maim," as before noticed, is explained in the Digest, no explanation is given of the other expressions. But it seems to be understood that "to disfigure" is to do a man some external injury which detracts from his personal appearance, but does not weaken him; so the cutting off a man's ear or nose comes under this term by the English law, as it does, we apprehend, by this Code. Again "to disable" is to do something creating a permanent disability and not a mere temporary injury. It is not requisite, it appears, that "a grievous bodily harm" within the meaning of the law, should be either permanent or dangerous. Grievous bodily harm neither permanent nor dangerous is but a vague definition, yet it seems to be the closest that has been given by authority; probably in the practical administration of the law there is a pretty near approach to the rule laid down in this Code.

See Authorities referred to in Tomlin's Dictionary under the head "Mayhem."

374. We cannot but think that there is reason in the exceptions taken to estimating the severity of a hurt by the time during which the sufferer is unable to follow his ordinary pursuits, as a rule which will operate unequally. The man who lives by daily labour suffers far more by being kept from his work for twenty days, than he who has independent means, and whose ordinary pursuits may be intermitted for that time without causing him any material privation. Again an injury to the right hand may in the case of a clerk keep him from his work for twenty days, which if it happened to the left hand would be of no consequence. An injury to the foot may prevent one man from following his business, in which walking is necessary, which if it happened to another man in a sedentary employment would not interrupt him at all. The proposed criterion is therefore unsatisfactory, but some criterion is necessary and it will be difficult to devise a better. The following may perhaps be convenient—"such hurt as from the pain or disease it has caused, or the time it has prevented the sufferer from following his ordinary pursuits, is equivalent to the fracture or dislocation of a bone."

375. Upon Clauses 316 and 317, which define what it is "voluntarily to cause hurt" and "voluntarily to cause grievous hurt" respectively, Mr. G. W. Bacon makes the following remarks: "The intention "may be easily proved from the previous conduct of the offender, but

" how we are to get at what degree of hurt he knew himself likely " to inflict, I know not. We will take the illustration (*a*) to Clause 329. " A intends to hurt Z, but it is impossible that he should have known it " to be likely that the hurt would be grievous under any of the first " seven definitions of Clause 315; or that Z would in consequence of it be " confined to his room for twenty days, under the eighth. Hurt not at all " grievous is received by Z. Is A to be punished under Clause 318, or " 329, or both? It is clear that hurt of both degrees may be the " consequence of A's conduct, but that's no reason for our inferring that " it was his intention to cause grievous hurt, or that he knew it to " be likely that the hurt would be of a grievous kind. Instead of " troubling ourselves with what the offender thought was likely to " happen, we ought to enquire and decide whether his act was such, as " would by its nature more probably cause grievous than simple hurt, " and whether from previous enmity there was reason to conclude that " the offender intended the former rather than the latter."

376. Now in the case put by Mr. Bacon it appears to us not only possible that A should know, but inconceivable that he should not know it to be likely that Z would sustain grievous hurt, perhaps a fracture or dislocation, by his horse falling over the rope intentionally tied by A across the road by night for the purpose of causing him to fall. If Z suffered hurt, but not grievous hurt by the fall, A might be arraigned either under Clause 318 for " voluntarily causing hurt," or under Clause 329 for the *attempt* to cause *grievous* hurt, but not under both.

377. We agree with Mr. Bacon in what we conceive to be his meaning as to the duty of the Judge, that is to say, that he is not to trouble himself with seeking for direct proof of what the offender thought was likely to happen, but is to infer it from the nature of his act, taking him to have intended grievous hurt, or at least to have contemplated grievous hurt as likely to occur, when he did what every body knows is likely to cause grievous hurt, and the more certainly drawing this conclusion where there is evidence of previous enmity against the party who has suffered. If the act was such that nothing more than simple hurt could reasonably be thought likely to ensue from it, then although grievous hurt may unexpectedly have ensued, it would be his duty to convict the offender of simple hurt only under Clause 316, judging that grievous hurt was not in his contemplation; for according to Clause 317 a person can be convicted of grievous hurt only when the result and the intention correspond, or when grievous hurt has been suffered from an act which was intended to cause grievous hurt, though it may be of a different kind.

378. Mr. Greenhill suggests that the minimum term of imprisonment should be omitted in Clauses 319 and 321, which define the punishments for "grievous hurt," and "hurt for the purpose of extortion," giving instances of cases which seem to fall within the definitions of those offences respectively, but which it would be improper to visit with the least degree of punishment therein prescribed. "Where the range is so "great and the degrees so indefinite, he thinks it would be enough to "fix the maximum;" an opinion in which we agree. On the same ground we agree with Mr. Pyne in thinking that the minimum term of imprisonment under Clause 322, viz. seven years, is likely to be found too severe a punishment in some cases, when the injury which has been sustained, although it may fall within one of the definitions of grievous hurt, is really not of an aggravated nature.

379. Mr. Greenhill asks whether Clause 320, which punishes hurt in an attempt to commit murder with transportation for life as the maximum, and imprisonment for seven years as the minimum, "is not "inconsistent with 309 whereby a person firing at another with intent "to murder, but misses his aim, is only liable to three years." Mr. Greenhill appears to have made a mistake on this point, for Clause 309 does not apply to an attempt to commit *murder*, but an attempt to cause the death of a person, which if it had succeeded would have rendered the offender guilty of voluntary culpable homicide not amounting to murder. The punishment for an attempt to commit murder (Clause 308) is the same as that laid down in Clause 320.

380. Upon Clause 323 which provides for the punishment of hurt caused by means of the edge or point of any sharp instrument, &c. Mr. Greenhill asks if this would include a pointed piece of wood, and suggests, if it is intended to confine the penalty to an instrument the point or edge of which is metal, that it should be so expressed. The same suggestion he offers with respect to Clause 324. The instrument must be a *sharp* instrument with an *edge* which will cut, or a *point* which will stab; any instrument which answers to this description we apprehend will be within the definition whether made of metal or not.

381. The Sudder Court for the North Western Provinces observe that "the Code does not seem to make provision for the offence of "administering poisonous or deleterious drugs in victuals or drink with "the view to stupify and rob persons, reckless whether death may be the "consequence of the act or not."

382. In making this remark the Court must have overlooked Clauses 323 and 324, which provide among other things for "hurt" and

"grievous hurt" caused by means of "any substance which it is deleteri-"ous to the human body to inhale or swallow." The maximum punishment for grievous hurt so caused is imprisonment for fourteen years. The Court recommend transportation for life.

383. We think with Mr. Pyne that it is advisable to omit the minimum under Clause 324, as under Clauses 319 and 321, for the reason above stated.

384. We observe that in the provisions of the English law for the punishment of cutting, &c. with intent to maim, disfigure, or disable, or to do some other grievous bodily harm, attempting to murder by poison, &c., there is no minimum limit to the imprisonment to which the offender may be sentenced.

385. We have remarked that the term "maim" in the English Criminal law includes the hurt designated as "grievous" under the 1st, 2nd, 4th, 5th and 7th heads of Clause 315. *Attempts* to maim, disfigure, or disable, or to cause some other grievous bodily harm, are classed together in the English law, and are punishable by transportation for life, or for any term not less than fifteen* years, or imprisonment for any term not exceeding three years. By this Code the maximum punishment for grievous hurt comprehending disfiguration and temporary disabling, as well as the hurts which come under the description of maiming, as above, is imprisonment for ten years, but this cannot be inflicted for an attempt to cause hurt unless the hurt has been actually caused. An *attempt to hurt* when the hurt intended has not been produced, is punishable by imprisonment for half the term to which the offender would have been liable if his attempt had succeeded.

* Proposed in the Digest to be reduced to seven years. Art. 5, Sec. 5, Chap. XV.

Clause 329.

386. While by this Code hurt caused in an attempt to murder is punishable with transportation for life or rigorous imprisonment for not less than seven years, the same offence by the law of England is capital, and attempts to murder, although no bodily injury be effected, are punishable with transportation for life as the maximum.

OF WRONGFUL RESTRAINT AND WRONGFUL CONFINEMENT.

387. We find Mr. Hudleston alone objecting generally to the rules regarding wrongful restraint and wrongful confinement contained in Clauses 330 to 339. He says—"This part of the Code appears to me to be "over-legislation. The illustrations are remarkable for perverted ingenuity "not unfrequently displayed in this work" Referring to the explanations under Clause 330 and to the illustration (*d*) he observes, that "volun-"tarily causing a man to believe a dog savage, who is not savage and

"threatening to set him at the said man, so preventing the man from "going along a path, does not appear a very simple description of "wrongful restraint." "To the Clauses which follow to 338 inclusive," he adds "I prefer the English law of false imprisonment."

388. It is to be wished that Mr. Hudleston had explained what he understood to be the English law on this point, and in what respect he preferred it. It seems that in the administration of the law of England the forcible detention of a person in the street is held to be *imprisonment*. Does Mr. Hudleston think it better that there should be a necessity for such a forced construction to bring the wrongful detention of a man under the law, than that there should be a distinct provision for that offence and another provision for the more aggravated offence of wrongful confinement? Mr. Hudleston objects to the Code in some places as giving to words a meaning not their own; on this ground he surely ought to object to the English law in the instance here given; for saying that to detain a man forcibly in the street is to *imprison* him. Clause 330 of the Code lays it down that to prevent a person from proceeding in any direction in which he has a right to proceed, that is, for example, to detain him forcibly in the street, is wrongful restraint, while wrongful confinement, obviously an aggravated form of wrongful restraint, is by Clause 331 defined to be preventing a "person from proceeding beyond "certain circumscribing limits," or, as it is explained in the note, "keeping a man within limits out of which he wishes to go and has a "right to go."

Russell 1, p 606.

Page 70.

389. Mr. Hudleston does not expressly object to the explanation subjoined to Clause 330, though he says of the example by which it is illustrated that it is not a very simple description of wrongful restraint. Let us take another example. Suppose that A presents a pistol at Z and threatens to fire at him if he goes in a certain direction in which he has a right to go, and thereby prevents him from going in that direction. Would Mr. Hudleston say that A does not wrongfully restrain Z, though in truth the pistol is not loaded?

390. Mr. Greenhill proposes a verbal alteration in Clause 334, that is, to substitute the definite words, "and less than ten days," instead of "or more," with reference to Clause 335, which provides for a confinement extending to ten days or more. As Clause 334 is obviously intended to apply to cases of confinement for three or more days less than ten, it may be as well to express this distinctly.

391. Upon Clause 335, which provides that confinement aggravated by duration for ten days or more, shall be punished with imprisonment

for a term which may extend to three years with additional imprisonment of from one to three days for every day of such wrongful confinement, Sir H. Seton questions the principle on which the punishment is enhanced, observing that retaliatory punishment is a relique of barbarism, and has always the appearance of vindictiveness. The remark applies equally to Clauses 336 and 337.

392. We admit the objection in general; but in these cases, while the punishment is enhanced according to the duration which constitutes the aggravation, "we have attempted to frame the law on this subject," say the Commissioners, "in such a manner as to give the offender a "strong motive for abridging the detention of his prisoner."

393. One cannot conceive of a wrongful confinement continued for ten days or more without deliberation and reflection and a special regard to the penal consequences, and when a man sees that by persisting in his offence he is every day becoming liable to a certain additional punishment, the motive to set his prisoner free will grow stronger daily. This reason we think obviates the general objection in these instances.

394. The other aggravations are when a person persists in wrongfully confining another notwithstanding a writ has been issued for his liberation; and when the confinement is for the purpose of extortion. The special provisions for these aggravated cases appear to us to be proper, except in prescribing a minimum of punishment. We would not fetter the discretion of the Judge further than by fixing the maximum in the three Clauses 335 to 337. The punishment for imprisonment according to the Digest of the law of England is imprisonment for *any* term not exceeding three years, *or* fine at discretion, or both. In the aggravated cases of confinement provided for by Clauses 335 to 337, imprisonment is prescribed peremptorily and fine may be added at discretion. Clause 336. 337.

395. With reference to Clause 338, the Commissioners say, "We "have also provided a separate punishment for a person who while de-"taining another in wrongful confinement omits to supply his prisoner "with every thing necessary to health, ease, and comfort." The Clause more definitely says, with any thing he knows to be "necessary to pre-"vent the person confined from being in danger of death or hurt." The punishment is imprisonment for a term which may extend to one year, or fine, or both. We understand that the offender may be sentenced to punishment under this Clause, and also for the offence of wrongful confinement under one or other of the Clauses relating thereto. Here are two offences committed not by doing one thing, but by an illegal act and Page 71.

an illegal omission distinct from each other and each constituting a distinct offence, and therefore not within the scope of Clause 58, which at first sight may appear to apply. It is said in the Note that "the effect "of this provision is that a person who wrongfully confines another will "be answerable for any bodily hurt which he may cause by wrongfully "omitting so to supply his prisoners." It would seem rather that he is made answerable for any hurt which his omission is likely to cause, though such hurt may not be caused. The illustration intimates that if hurt is caused the offender will be liable to punishment for the hurt in addition, as we understand, to the punishment for the confinement, the punishment for the omission under Clause 338 merging therein.

Page 71.

Of Assault.

Note M. p. 71

396. In their Note upon the provisions regarding Assault the authors of the Code say, "We have found great difficulty in giving a "definition of assault, and are by no means satisfied with that which "we now offer. As, however, it at present appears to us to include all "that we mean to include, and to exclude all that we mean to exclude, "we have adopted it in spite of the objections which we feel to its harsh "and quaint phraseology. We have adopted it with the less scruple "because we trust the illustrations will render it intelligible to an atten-"tive reader."

397. The definition of assault is contained in Clause 340 as follows: "Whoever intentionally uses force, or attempts to use force to any "person, without that person's consent, in order to the committing of "any offence, or intending or knowing it to be likely that by such use "of force he may cause to the person to whom the force is used injury, "fear, or annoyance, is said to commit an assault."

Chapter XV. Sec. 5, Art 48.

398. The definition of assault in the Digest of the English Criminal law runs thus: "An assault consists in an attempt or offer, by a "person having present ability, with force to do any hurt or violence to "the person of another." The definition in the Code appears to include what is termed "Battery" in the English law, which is defined in the Digest to be "any the least *hurt* or *violence* unlawfully and wilfully or "culpably done to the person of another." The Commissioners remark that "a large proportion of the acts designated as assaults will be "offences under the heads of hurt and restraint. But there will be "many assaults which it is absolutely necessary to punish, yet which "cause neither bodily hurt nor unlawful restraint." To cover *these* offences, the definition is necessarily framed in terms which include the former also.

Art. 47.

Notes p. 71. See also p. 67.

399. Where there is real hurt the charge we may suppose will be laid usually under the more appropriate head.

400. It is not we apprehend to the definition of assault in Clause 340 that the observations above quoted as to the harshness and quaintness of the phraseology apply, but to the elaborate explanation given in the preceding Clause 339 of what is meant by the essential words " uses force" in that definition.

401. There is no such explanation in the Digest of the English Criminal law. But Mr. Livingstone thought it necessary in giving his definitions of assault and battery, which he observes do not materially differ from those contained in the English law, to explain, both by definition and illustration, what is meant by the term " violence" which he uses instead of force.

402. Upon the explanation in Clause 339 of this Code, Sir H. Seton suggests for consideration, " whether the meaning of actual force might not " be left to common sense, and constructive force only defined." Mr. Hudleston says he " cannot bring himself to believe that a definition so artificial " as this will be adopted in preference to the sort of definition of assault " and battery used in the law of England." " For the sake of main- " taining ' literal truth,' " " in which it might be questioned whether or " not the Law Commissioners have succeeded, common sense appears to " me to be sacrificed." " It would require an Army of Magistrates to dis- " pose of the complaints invited as it were by the illustrations to Clause " 340, which moreover seem below the dignity of law." Mr. A. D. Campbell, colleague of Mr. Hudleston, dissents from the latter remarks, but concurs in the former.

403. In defining the term " violence," Mr. Livingstone uses the words " physical force," as words intelligible by themselves. He explains that " by violence is meant any physical force applied either immediately " by any part of the body of the person using it, or by the instrumen- " tality or intervention of any other matter, whether animate or inani- " mate, and it comes within the definition (of battery) whether the " violence be produced by secondary means intentionally prepared by the " offender, or be caused by his immediate act." This explanation is followed by illustrations exemplifying each of the modes of applying physical force.

404. It appears to us that it is unnecessary to define what is meant by using force directly, and that all that is required is to define the mode in which force may be used indirectly. We think therefore that Clause 339 may be omitted, and that it will be sufficient to subjoin to Clause 340 a simple explanation that a person may use force to another within

the meaning of the definition, not only by his bodily power directly affecting or acting upon that other person, but by means of any person, or of any animal, or of any inanimate substance, disposed or moved by him so as to affect or act upon that other person.

405. Illustrations may be given to exemplify force used by the instrumentality or intervention of other persons, or of animals or inanimate substances. In some of the cases there may be hurt, in others not, but this makes no difference. And although the party intended to be affected may not be affected, yet under the definition the attempt will be sufficient to constitute assault if it was made in order to the committing of any offence, or with the intention of causing or the knowledge, that it was likely to cause injury, fear, or annoyance to the person against whom the attempt was aimed.

406. Upon Clause 341 which defines what it is "to make shew of assault," Mr. J. F. Thomas makes the following observations, in which Mr. W. Hudleston and Mr. A. D. Campbell express their concurrence. "It deserves, I conceive, much consideration whether this "enactment is adapted to the existing state of society; unless some "special damage, or injury has been sustained, in consequence of this "shew of assault, it would be better to leave such acts unpunished, than "to open a wide a door, as this Clause must, to frivolous and vexatious "accusations."

"Every bazar fracas, where the parties are loud and angry, is "accompanied with abundant gestures and shew of assault, but it "appears to me nevertheless, on principles of general policy, inexpe-"dient to encourage a resort to the Criminal Courts in these and similar "cases, unless some special hurt or injury has ensued. If a party is of "that rank and estimation in society, that any preparation or shew of "assault degrades him, he may have his remedy by civil action. This "I am inclined to believe a better course, than to make the act of shew "of assault, as it now is, in all cases a crime."

407. What is here classed as a distinct offence less than assault, amounts to assault by the law of England, as laid down by Russell, "Drawing a sword or bayonet, or even holding up a fist in a menacing "manner, &c. &c. at a person who is within reach, or any other similar "act, accompanied with such circumstances as denote at the time an "intention coupled with a present ability of using actual violence against "the person of another, will amount to an assault."

Russell 1, p 604

408. The explanation subjoined to Clause 341 intimating that mere words do not amount to a shew of assault is conformable to the law of England. And we conceive that the further intimation that words may however be taken as circumstances giving a meaning to the gesture or act which they accompany, so as to make it amount to shew of assault, is also consonant to the English law.

409. Mr. W. Hudleston says, "I do not perceive why special pro-"vision for 'assault' should be made in Clauses 343 to 345 inclusive," viz. in attempting to murder, to commit the offence of kidnapping, and to cause grievous hurt. An answer is supplied by his colleague Mr. A. D. Campbell—"I deem 343 to 345 necessary in cases where proof may "be forthcoming to nothing but the 'assault' accompanied by attempt "to commit the specified crimes." He should have said, and perhaps he meant, where the attempt in fact was not carried beyond the assault. An attempt at murder carried beyond assault to such a length as the offender contemplates as sufficient to cause death falls under Clause 308. The punishment is the same in both cases, on the principle that "where the "murderous intention is made out the severity of the hurt inflicted is "not a circumstance which ought to be considered in apportioning the "punishment."

Note p. 69.

410. By Clause 346 an assault on a woman in an attempt to commit rape on her, is punishable with imprisonment of either description for a term which may extend to three years, and must not be less than six months, and fine at discretion. The Sudder Court for the North Western Provinces are of opinion that if this Clause contemplates provision for all acts short of penetration, the punishment is inadequate. Mr. W. Hudleston observes that in many cases seven or fourteen years would not be excessive, to which Mr. A. D. Campbell assents. We apprehend that in the law of England this offence falls under the general head of "an as-"sault with intent to commit a felony," which is punishable by fine and imprisonment. By the Article in the Digest which provides for such an assault it is declared to be punishable with imprisonment not exceeding two years, or fine at discretion, or both. But another Article provides that whosoever shall attempt to commit a felony by any assault, &c. done with the immediate intent to accomplish the criminal object, shall, though he fail in such attempt, be liable to imprisonment for any term not exceeding three years, or fine at discretion, or both. This, which probably would be applied to the case in question, it will be observed, agrees with Clause 346 of the Code, except that by the latter the imprisonment is not to be less than six months.

Art. 49, Sec. 5, Chapter XV.

Art. 8, Chapter XXII.

Note M. p. 1.

411. It is observed in the Note that severe punishments are provided for assault when it is committed with intention of dishonoring the sufferer, or when it is an outrage to female modesty. Clause 347 applies to an assault of the latter description, and Clause 348 to one of the former description. The punishment is imprisonment not exceeding two years, or fine, or both. The law of England appears not to provide for such assaults specially.* But they are specially provided for in Mr. Livingstone's Code. The punishment denounced therein for the former offence is imprisonment not exceeding one year or less than two months, and fine not exceeding 2,000 Dollars nor less than 200, and for the latter double the punishment assigned to the species of assault that is committed, but with a proviso that the fine shall not be less than 200 Dollars, nor the imprisonment less than sixty days.

* Taking indecent liberties with females, it appears, is a common assault. Russell 1, p. 605-6.

Arts. 433 and 434.

412. Mr. W. Hudleston thinks that these Clauses, and the rest to 352 inclusive, "might advantageously be omitted," while Mr. A. D. Campbell on the contrary deems the distinctions made by them judicious and proper.

413. Sir H. Seton questions the use of so vague a term as "dishonor" in a Criminal Code. Mr. Greenhill observes, "To dishonor does "not appear sufficiently definite, and if intended to apply to mere insult, "such as pulling a man's nose or laying a whip across his shoulders, the "punishment seems disproportionate to the penalties of the preceding "Clauses." Mr. E. Monckton remarks that it would be an outrage to the modesty of one woman to do to her what would be thought nothing of by another. A kiss that would be highly resented by a lady might be no affront to the maid. He thinks illustrations would be useful.

414. When it is considered that such an insult as that mentioned by Mr. Greenhill will, by reason of the provocation arising from it, extenuate the act of killing the offender by the person insulted so as to make him guilty of manslaughter instead of murder, it may be thought fitting to visit it with a severe punishment. The same reason applies to assault outraging the modesty of a woman, "such an assault, (for exam-"ple) as called forth the memorable blow of Wat Tyler."

415. There is a sufficient discretion allowed as to the extent of punishment to admit of a due regard being paid to variety of condition and circumstances, making the same act less offensive to one person than to another.

Clause 349.

416. An assault in attempting to commit a theft of property which a person is actually wearing or carrying is punishable by imprisonment

of either description which may extend to two years, or 2-3ds of the term of imprisonment which may be inflicted for the offence of theft, but in the latter case the imprisonment is to be rigorous. An assault in attempting wrongfully to confine a person is punishable by imprisonment of either description which may extend to one year, with fine limited to 1,000 Rupees. The Sudder Court, North Western Provinces, say they do not perceive why the punishment for the latter offence should be less than that for assault in an attempt to steal according to Clause 349. They appear to have overlooked that the punishment in Clause 349 exceeds that provided for "wrongful confinement." The punishment for assault in attempting to confine wrongfully is the same as for wrongful confinement.

Clause 350.

Clause 333.

417. Mr. G. W. Bacon suggests that confinement and assault to confine, under false pretence of lunacy, ought to be particularly noticed and severely punished. It does not appear to us that it is necessary to distinguish such cases. The maximum punishments authorized may be considered sufficient to meet the aggravation mentioned by Mr. Bacon.

418. Assault upon grave and sudden provocation is not wholly excused, but the punishment is limited to imprisonment for one month as the maximum, or a fine not exceeding 200 Rupees, or both. "Shew of "assault" is liable to the same punishment.

Clause 351.

Clause 352.

419. Of kidnapping the Commissioners observe, "The crime con- "sists, according to our definition of it, in conveying a person with- "out his consent, or the consent of some person legally authorized "to consent on his behalf, or with such consent obtained by deception, "out of the protection of the law, or of those whom the law has ap- "pointed his guardians." "This offence may be committed on a child "by removing that child out of the keeping of its lawful guardian or "guardians. On a grown man it can only be committed by conveying "him beyond the limits of the Company's Territories, or by receiving "him on board of a ship for that purpose." These definitions are contained in Clauses 353 and 354.

Of Kidnapping.

Note M. p. 72.

420. The punishment for simple kidnapping is imprisonment of either description not exceeding seven years and not less than one year, also fine.

Clause 355.

421. The punishment is enhanced in cases in which the kidnapping is committed with murderous* intentions, or with the intention of inflicting grievous bodily hurt, or of reducing the sufferer to slavery, or for the purpose of rape, or of unnatural lust.†

* 356. Transportation or rigorous imprisonment for life or imprisonment for not less than seven years, also fine.

† 357. Imprisonment of either description not exceeding fourteen and not less than two years, also fine.

Chapter XV., Sec. 5, Art. 34.

422. The offence of child-stealing simply by the law of England is punishable with transportation for seven years, or imprisonment not exceeding two years, proposed in the Digest to be extended to three years. The child must be under the age of ten years. The age specified in the Code is twelve years.

423. Upon the provisions in the Code regarding this offence, Mr. Pyne makes the following remarks: "Kidnapping is a crime so injurious "to society under either of the definitions given in Clause 353, but more "particularly from the Territories of the East India Company, that I am "inclined to think the punishment here provided is too mild for the "magnitude of the offence, the object of which may be perpetual impri-"sonment, an aggravation of crime unprovided for. The facility with "which persons may be made away with without exciting observation "among their relations or the police has been lamentably exemplified in "the recent discovery of Thuggee, and once across the boundary of the "British Territory the succour of the law will rarely be extended to them."

"With reference to kidnapping being made for the purpose, or liable "to the consequence of subjecting the person to unnatural lust, the "utmost penalty of the law, short of capital punishment, does not ap-"pear to me too rigorous for the offence—the punishment provided in "Clause 362 is, I am of opinion, both as to its minimum and maximum "proportions more appropriate than the limited period of imprisonment "set forth in this Clause."

424. The Sudder Court, North Western Provinces, propose to add to Clause 357 the words "or the dedicating that person to prostitution." They observe that "cases are of common occurrence in this country in "which children are left at fairs, or abandoned in times of famine and dis-"tress, and provision is required for the punishment of persons appro-"priating such children with evil intentions."

425. We are are not prepared to advise any alteration of the punishments proposed in the Code.

426. It seems to us to be worthy of consideration whether the definition of kidnapping a child may not be enlarged, so as to include the illegal taking and detaining of a child not *actually* in the keeping of his lawful guardian at the time of such taking, for example, a child who has strayed and been left behind at a fair, still more a child whose parents have been murdered in order that the murderers may obtain possession of the child.

Vide Extract from Major Sleeman's Report on Megpunnaism at p. 347.
Report of Indian Law Commissioners on Slavery in India.

427. While we think with the Sudder Court, North Western Provinces, that it is a serious aggravation of kidnapping when it is committed with the intention of devoting a child to prostitution, yet we do not conceive it to be necessary to provide for that aggravation specially, considering that the offence may be punished under Clause 355 with imprisonment extending to seven years, and fine at discretion, which we deem to be sufficient.

Note M. p. 72.

428. It is explained that Clause 358 was intended for the punishment of persons exporting laborers by Sea from the Company's Territories, in contravention of the Act recently passed on that subject. The Act referred to must have been V. of 1837, afterwards repealed. The Acts on this subject at present in force are XV. of 1842 and XXI. of 1843 for the Island of Mauritius, and XXI. of 1844 for Jamaica, &c.

429. It seems to us that if provision is to be made in this Code for the punishment of acts contravening the said laws, it should be in exact correspondence with what is therein enacted on the subject, and this would be best done by adopting in the Code, with such verbal alterations as may be necessary in order to uniformity of expression, the definitions of the offences and the penalties to be inflicted contained in Sections IX., X. and XIII. of Act XV. of 1842, with which those contained in Sections X., XI. and XIV. of Act XXI. of 1844 are identical.

430. We have now to notice the suggestion of Colonel Sleeman to introduce in this place a declaration that the right of parents over their children does not extend to the disposing of them by sale, and provisions for the punishment of persons who shall sell or buy human beings within the Company's Territories, or shall import human beings into the Company's Territories for sale.

Letter to Secy. to Govt. of India, dated 18th February 1840, and Notes of Colonel Sleeman upon the Penal Code.

431. The Law Commissioners had this suggestion under consideration in preparing their Report upon Slavery in India.

Letter from Secy. to Govt. of India, dated 9th March 1840, enclosing an extract from the above letter, dated 18th February 1840.

432. The subject is treated in the portion of that Report entitled "Observations," p. 345 to 353. The recommendations of the Commissioners in which they were unanimous, are stated at p. 365-6. We quote the following remarks from p. 353 :—

"The prohibitory part of our recommendations is in conformity, it "will be seen, with those which Major Sleeman has made upon the same "subject. But in the permissive part we have ventured to go beyond "what he thinks expedient. He dreads the consequences of allowing "contracts for the services of infants terminating at the age of maturity.

" 'Who shall say' he asks 'into what hands or into what country such
" 'children shall be transferred before that time comes?' "

" This is undoubtedly an evil to be guarded against, but we think
" that the system of registration which we recommend may be so orga-
" nized as to accomplish that purpose. We have the high authority of
" Major Sleeman himself for asserting that in seasons of calamity the
" permission to purchase and sell children saves no doubt a great number
" from starvation. We could not therefore make up our minds to take
" away altogether this resource from the starving poor, unless we were
" prepared to suggest some other. But we are afraid that it would not
" be possible in this country to set up any tolerably safe and economical
" machinery for the distribution of public charity. We therefore propose
" to permit these apprenticeships."

433. It was proposed to declare it to be lawful for the parents or guardians of minors to apprentice them till majority, or for any shorter period, and to punish any other person who should pretend to apprentice or sell a minor, and any person who should purchase or receive as an apprentice any minor from any person whom he had not good reason to believe to be the parent or guardian of such minor, and any person having in his possession one or more minors with the intention of selling or apprenticing them, not being the parent or guardian of such minors.

434. The views of the authors of the Penal Code on the subject of Slavery are stated in Note B, p. 22 to 25. By Section IV. Act V. of 1843 it is enacted, according to their opinion, that any act which would be a penal offence if done to a free man, shall be equally an offence if done to any person on the pretext of his being in a condition of slavery.

435. The private sale of a free person for the purpose of being dealt with as a slave is not prohibited by this law, but as under Section IV. of the Act no person so sold could be dealt with as a slave against his will, it amounts to a virtual prohibition, which may be effectual as regards adults who can avail themselves of the protection of the law, without any further provision.

436. But with respect to children a further provision appears to be requisite. We think it should be made penal to sell or purchase a child under any circumstances.

Regulation XIV. of 1827, Sec. 31.

437. The existing law of Bombay makes it an offence to sell a child under ten years of age, although already in a state of slavery, and

to sell a free child of any age into slavery, except in time of famine; in the case of a free child the power of selling in such an emergency is confined to the parent.

438. We think that the sale of children by their parents, even in time of famine, should be prohibited. It does not appear to us to be right to permit it for the sake of the parents, that is, to enable the parents to get something for themselves besides being relieved from the burden of supporting the child, and it appears to be unnecessary for the sake of the child in order to save it from starvation, for we apprehend that it will not be more difficult to find a person willing to take the charge of a child in such extremity where nothing is to be paid to the parents, than to find one to purchase it for a price. The latter would have no greater power to retain the child in his service than the former.

Of Rape. Clause 359.

439. We do not find any objections to the definition of rape except with regard to the 3d and 4th descriptions.

440. The 3d description of rape is when it is committed with the consent of the woman, but "when her consent has been obtained by putting her in fear of death or of hurt." Mr. A. D. Campbell and Mr. Pyne recommend that the words "or of hurt" be omitted, on the ground, as stated by Mr. Pyne, that "when the fear of the most trivial hurt produces consent, the woman's reluctance or chastity cannot be over great or rigid." Mr. D. Greenhill proposes the words "grievous hurt" instead of "hurt." We concur in this suggestion. The words of the English law on this point as given in the Digest are "grievous bodily harm."

Art. 21, Sec. 5, Chapter 15.

441. The 4th description of rape is when it is committed with the consent of the woman, but "when the man knows that her consent is given because she believes that he is a different man to whom she is or believes herself to be married."

442. Mr. J. F. Thomas suggests that this protection should not be restricted to the case of *married* women alone. He thinks that slave girls and other women, who from the institutions of the country may not be married, but who cohabit with one man, and whose children are recognized as his by the father, are equally entitled to protection; he proposes to add after the words "to whom she is or believes herself to be married" the words "or with whom she cohabits."

443. We rather incline to the opinion of Mr. Thomas that it is desirable to give to females in the circumstances which he indicates the

same protection in the case in question as is given to married women; but an obvious objection to such an extension of the provision is that it would give occasion to a troublesome collateral inquiry, likely sometimes to be turned into a trial of the complainant's conduct. Should the suggestion of Mr. Thomas be adopted we think it would be advisable to subjoin to the words, "or with whom she cohabits," the words following, "in "such a manner that children born of her during the cohabitation will "be entitled by the law of the parties to claim a maintenance from him," or words to that effect.

444. Again Mr. Thomas objects to the "exception which declares "that sexual intercourse by a man with his own wife is in no case rape." He says "I doubt the propriety of this exception. The early age at "which children are married and are in the eye of the law wives, makes "it necessary that protection should be given to them by the law till "they are of age to reside with their husbands. I remember a case of "forcible violation and great injury to a child where the offender was the "husband." Mr. Hudleston and Mr. A. D. Campbell concur with Mr. Thomas.

445. Although marriages are commonly contracted among Mahomedans and Hindoos before the age of puberty on the part of the female, yet usually the bride remains in the house of her parents till she is of a fit age for the consummation of the marriage, and it may be fairly presumed that the parents, her natural guardians, will in general take care to prevent abuse in this respect. There may however be cases in which the check of the law may be necessary to restrain men from taking advantage of their marital right prematurely. To meet such cases it may be advisable to exclude from the exception cases in which the wife is under nine years of age. Instances of abuse by the husband in such cases will then fall under the 5th description of rape.

446. We may observe that by the Statute 9 Geo. IV. Cap. 74, which governs the administration of Criminal Justice by Her Majesty's Courts in India, the age under which the carnal knowledge of a girl is a crime of the same degree with rape, is eight years; by the law in force in England it is ten years.

Sec. 65.

447. By the law at present in force in England the punishment for the crime last mentioned as well as for rape is transportation for life: by the Statute for India the punishment for both is death. The punishment prescribed by the Code is imprisonment not exceeding fourteen years and not less than two years, with fine in addition at the discretion of the Court.

Sections 64 and 65.
Clause 360.

448. Mr. J. F. Thomas thinks that both the maximum and minimum are fixed too low by the Code. He observes that "it would not be "rare to find women of caste by whom death would be considered a less "evil than the violation of their persons by some low caste fellow. In "a society so constituted the offence of rape should be visitable with the "higher penalty of imprisonment for life." "I can perceive," he proceeds to say, "no good reason for so low a penalty as two years. If rape "at all it must merit a higher penalty. This large range of two to "fourteen years in the case of an offence not capable scarcely of degrees, "for either there was or there was not a forcible violation, goes rather "to meet cases of doubt as to the fact than degrees in the offence. If "the fact of forcible violation was fully established I can perceive no "ground, even if the woman was without character, for lessening the "security of person. If not established then there was no rape, and let "it be dealt with as an assault if it be thought proper, or acquittal is "preferable if there is the slightest doubt of the fact." Mr. A. D. Campbell agrees with Mr. Thomas; Mr. Hudleston is of opinion that the punishment should not be less than imprisonment for seven years.

449. We cannot admit that this offence is not capable of degrees. Mr. Thomas has himself suggested cases differing very greatly in degree. On the one hand let us take the case of the chaste high caste female, who would sacrifice her life to save her honor, contaminated by the forcible embrace of a man of low caste, or of one who is below caste, say a Chandala or a Pariah. On the other hand that of the woman without character, or any pretension to purity, who is wont to be easy of access. In the latter case if the woman, from any motive, refuses to comply with the solicitation of a man and is forced by him, the offender ought to be punished; but surely the injury is infinitely less in this instance than in the former.

450. The punishment at present inflicted by the Company's Courts is ordinarily limited to imprisonment for seven years, and we suppose that in the worst cases the term of fourteen years is not exceeded. We think it advisable to allow the wide discretion permitted by the Code.

UNNATURAL OFFENCES.

451. The Law Commissioners observe that Clauses 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible should be said. They therefore leave the provisions proposed therein without comment to the judgment of the Governor General in Council. Mr. A. D. Campbell in concurrence with Mr. Blane censures the false delicacy which has in their opinion caused a most improper ambiguity in these Clauses, leaving it uncertain whether they

apply to mere indecent liberties, or extend to the actual commission of an offence of the nature indicated.

452. It appears to us clear enough that it was meant to strike at the root of the offence by making the first act tending to it liable to the same punishment, if the Judge shall deem it proper, as the offence actually accomplished. This is a new principle, and it would have been better if the Commissioners had explained for what reason they adopted it, in respect to the offences here contemplated in particular. We conceive that there is a very weighty objection to the Clauses in question, in the opening which they will afford to calumny, if for an act so slight as may come within the meaning of the word "touches," a man may be exposed to such a revolting charge and suffer the ignominy of a public trial upon it.

453. Colonel Sleeman advises the omission of both these Clauses, deeming it most expedient to leave offences against nature silently to the odium of society. It may give weight to this suggestion to remark that the existing law on the subject is almost a dead letter, as appears from the fact that in three years only six cases came before the Nizamut Adawlut at Calcutta, although it is but too true we fear that the frequency of the abominable offences in question "remains," as Mr. A. D. Campbell expresses it, "a horrid stain upon the land."

Statement from Sept. 1841 to July 1844.

454. Mr. Livingstone, we observe, makes no mention of offences of this nature in his Code for Louisiana, and they are omitted in the revised Statutes of Massachusetts, of which the Chapter "of offences against the lives and persons of individuals" is appended to the 2d Report of the English Criminal Law Commissioners. By the French Penal Code offences of this description do not come within the scope of the law unless they are effected or attempted by violence, except the sufferer be under the age of ten years.

No. 7.

Art. 332. 331.

455. The English Law Commissioners stated in their 2d Report that it was their intention to enter upon the consideration of the laws relating to offences of this description, but in their 4th Report they observed that as the mitigation of capital punishment had since the 2d Report was made been maturely considered by Parliament without leading to any alteration of the law relating to these offences, they for the present thought it unnecessary to make remarks upon them, and it does not appear that they afterwards resumed the subject.

CHAPTER XIX.

OF OFFENCES AGAINST PROPERTY.

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456. In their Note upon this Chapter the authors of the Code advert to the peculiar difficulties that oppose the efforts of the Legislator to define with clearness and precision the offences which are the subject of it. "The offences defined in this Chapter," they observe, "are made punishable on the ground that they are violations of the right of property. But the right of property is itself the creature of the law. It is evident, therefore, that if the substantive Civil law touching this right be imperfect and obscure, the Penal law which is auxiliary to that substantive law, and of which the object is to add a sanction to that substantive law, must partake of the imperfection or obscurity It is impossible for us to be certain that we have made proper penal provisions for violations of civil rights till we have a complete knowledge of all civil rights; and this we cannot have while the law respecting those rights is either obscure or unsettled. As the present state of the Civil law causes perplexity to the Legislator in framing the Penal Code, so it will occasionally cause perplexity to the Judges in administering that Code. If it be matter of doubt what things are the subject of a certain right, in whom that right resides, and to what that right extends, it must also be matter of doubt whether that right has or has not been violated." Note N Page 73

"It would, evidently," they continue, "be impossible for us to determine in the Penal Code all the momentous questions of civil right which in the unsettled state of Indian jurisprudence will admit of dispute. We have, indeed, ventured to take for granted in our illustrations many things which properly belong to the domain of the Civil law, because, without doing so, it would have been impossible for us to explain our meaning. But we have, to the best of our judgment, avoided questions respecting which, even in the present state of Indian jurisprudence, much doubt could exist. And in the text of the law we have, as closely as was possible, confined ourselves to what is in strictness the duty of persons engaged in framing a Penal Code. We have provided punishment for the infraction of rights, without determining in whom those rights vest, or to what those rights extend. We are inclined to hope that even if the Penal Code should come into operation before the Code of Civil rights has been framed, the number Page 74

" of cases in which the want of a Code of Civil rights would occasion " perplexity to the criminal tribunals will bear but a very small propor- " tion to those in which no such perplexity will exist."

" All the violations of property proposed to be made punishable by " this Chapter," it is remarked, " fall under one or more of the following " heads:—

" 1 Theft.
" 2 Extortion
" 3. Robbery.
" 4. The criminal misappropriation of property not in possession
" 5. Criminal breach of trust.
" 6. The receiving of stolen property.
" 7. Cheating.
" 8 Fraudulent Bankruptcy
" 9. Mischief
" 10 Criminal trespass."

457. The Commissioners observe that " all these offences resemble " each other in this, that they cause, or have some tendency, directly or " indirectly, to cause some party not to have such a dominion over proper- " ty as that party is entitled by law to have."

458. They remark that " every offence against property may be " fraudulently committed. But theft, extortion, robbery, the criminal " misappropriation of property not in possession, criminal breach of " trust, the receiving of stolen property, fraudulent bankruptcy, and " cheating, must be in all cases fraudulently committed. Fraud enters " into the definition of every one of these offences. But fraud does not " enter into the definition of mischief, or of criminal trespass."

Page 76 459. After stating that they believe it to be impossible to mark with precision by any words the circumstances which constitute possession, and giving instances illustrative of the difficulty, the Commissioners say, " For the purpose of preventing any difference of opinion from " arising in cases likely to occur very often, we have laid down a few
Page 77 " rules (See Clauses 17, 18, 19) which we believe to be in accordance " with the general sense of mankind as to what shall be held to consti- " tute possession. But, in general, we leave it to the tribunals, without " any direction, to determine whether particular property is at a parti- " cular time in the possession of a particular person, or not."

460. The Chapter begins with the definition of "Theft." Between this head and that of "Robbery" is interposed the definition of "Extortion," an arrangement suited to the definition of "Robbery," in which it is declared that to constitute the offence so designated there must be either theft or extortion. Clause 363 Clause 377. Clause 368.

461. In theft, as it is defined in this Chapter, the object is to take property which is in the possession of a person out of that person's possession. This renders it necessary to introduce separate provisions under the head of "Criminal misappropriation of property not in possession," Clause 383. After this is the head of "Criminal breach of trust," Clause 386. Then that of "Receiving stolen property," Clause 389, which includes cases in which property is transferred by the last two offences as well as by theft and robbery. Last of the offences classed as fraudulent is "Cheating." Clause 363.

462. We have already noticed Mr. Norton's comment upon the definition of the term "fraudulently" in Clause 16, as including highway robberies among frauds.* Here with reference to the definition of theft in Clause 363, after offering a definition of his own, regarding which he says, "whether it be clearer than that in the Code, or whether it be more "or less comprehensive than it ought to be, or than that in the Code, "I shall not argue;" he adds, "it appears to me at all events that the "ingredient of the crime expressed by the terms whoever *intending* to take "*fraudulently* a thing which is *property*, moves that thing in order to such "taking, is vague enough to lead to various constructions and to various "difficulties in the way of proof." Mr. Norton's definition of course omits the term fraudulently. His objection to the use of this term is the more remarkable as he professes to follow the law of England, and it is employed in the more ancient definitions of theft or larceny according to that law, as well as in the modern work of Sir E. H. East, which, say the English Criminal Law Commissioners, "has in practice been very "much used as a substitute for a Digest." In their 4th Report the English Criminal Law Commissioners proposed a general definition as follows: "A fraudulent intention to appropriate that which belongs to "another is an ingredient common to the offences of Of Theft. Bracton and Glanvil, cited by Russell 2, p 93 Russell ut sup.

"Theft, including robbery;
"Extortion by threats;
"Obtaining by false pretences;
"Cheating;
"Embezzlement."

See also prefatory remarks, p. 52, 4th Report.

* Mr A Begbie makes remarks somewhat to the same effect, but apparently overlooking the definition in Clause 16

463. We subjoin for the sake of easy comparison the definitions of theft in the Code and in the Digest:

Indian Penal Code, Clause 363—"Whoever, intending to take "fraudulently any thing which is property, and which is not attached to "the earth, out of the possession of any person, without that person's "consent, moves that thing in order to such taking is said to commit "'Theft.'"

7th Report

Digest of the English Criminal Law, Chapter 18, Section 1, Article 1—

"Theft consists in,

"1st A taking and removing of something;

"2nd. Being of the property of some other person and of some "value;

"3rd. Without consent to transfer the right of property given by "a person authorized so to consent, or notwithstanding consent so given, "if such consent shall be obtained by intimidation;

"4th. And also without consent to part with the possession given "by a person authorized so to consent, or, notwithstanding consent so "given, if such consent shall be obtained by intimidation or fraud;

"5th. With intent to despoil the owner and fraudulently appro-"priate the thing taken and removed."

464. In comparing these definitions, it is to be remembered, that to take fraudulently in the phraseology of the Code means to take a thing "with the intention of causing wrongful gain to one party by means of "wrongful loss to another party."

Clause 16.

465. According to the Code Penal, Article 369, "Quiconque a soustrait fraudulensement une chose qui ne lui appartient pas, est coupable de vol."

466. The following is Mr. Livingstone's definition, Article 645, "Theft is the fraudulently taking of corporal personal property, having "some assignable value and belonging to another, from his possession, "and without his assent."

467. "Explanations" and numerous "illustrations" are subjoined to the definition of theft in the Code, in order to explicate and elucidate as far as possible what is abstruse in it. So also the definition in the Digest is followed by expository Articles, which correspond in many points with the explanations in the Code.

468. In the Code for example in explanation of the words of the definition, "a thing not attached to the earth," it is declared that "a thing which is attached to the earth becomes capable of being "the subject of theft as soon as it is severed from the earth," and again, "a moving effected by the same act which effects the severance may "be a theft." In like manner in the Digest, after an explanation that the law of theft extends to all moveable property, it is declared that it extends "also to property severed from the realty, although it be "severed at the time and for the purpose of taking and removing the "same." Art 6, Sec. 1, Chapter XVIII.

469. Referring to the explanations in the Code Mr. Norton says, "the *moving* any thing *attached to the earth* in order to such taking "(such a taking as is contemplated in the definition) and the mere "*severing* it from the earth, are distinguished, the latter being a theft, "and the former not, but that distinction seems to me peculiarly subtle, "to say the least of it." Mr. Norton perhaps forgot that the distinction here noticed, by which a severance is necessary to make that a theft which else would not be a theft, is the rule of the English Criminal law in cases of ordinary theft of moveables, for though it be "well settled "that the felony lies in the very first act of removing the property and "therefore that the least removing of the thing taken from the place "where it was before with an intent to steal it, is a sufficient asporta-"tion, though it be not quite carried away," yet there must be a *severance*. Thus "in a case where goods in a shop were tied to a string "which was fastened by one end to the bottom of the counter, and a "thief took up the goods and carried them to the door as far as the "string would permit, and was there stopped, this was holden not to "be a felony, because there was no severance." Russell 2 p. 96.

470. The rule is different in regard to things *severed from the realty*. There must be a severance, but the severance and the *instant* taking of the thing severed do not constitute a theft. The following are the observations of the English Criminal Law Commissioners on this point: "We have already had occasion to observe upon the dis-"tinction which the law makes between mere moveables and adherents "to the realty. This gives rise to the rule that one who severs property 4th Report p 53

"from the realty and forthwith carries it away, is not guilty of theft, "but of a trespass only. This rule is, in many respects, opposed to "reason and convenience, the more especially as it has been extended by "means of a very fanciful doctrine to mere moveables, not because they "are adherents to, but because they 'savour of the realty.' The effect "of the rule has been to leave a considerable class of property without "adequate protection from the Criminal law, and to induce the neces-"sity of making many supplementary laws for partially remedying the "defect. The rule itself is one of vague and indefinite operation, leav-"ing it wholly uncertain what length of time must intervene between "the severance and the taking to constitute the guilt of theft."

Art 6, Sec. 1, Chapter XVIII.

471. The remedy proposed is to abolish the rule, and this is the object of the article we have quoted above, whereby the English law will be brought into conformity on this point with that proposed in the Code.

*See Art. 5, which explains that it is not essential that the thing taken "be completely freed from all impediment to further removal."

472. It is proposed also to abolish the rule as to severance in the case of moveables,* so that on this point likewise the Digest agrees with the Code.

First Report p 9.

Vol 4. p. 229

Chapter XVIII Sec 1, Art. 1.

4th Report p 57.

473. The English Criminal Law Commissioners in their Digest of the Common law relating to theft as actually in force, adopted the definition given by Blackstone—"Theft is the felonious taking and carry-"ing away of the personal goods of another." In the definition proposed in the Digest submitted in their 7th Report which we have transcribed above, they use the word "removing" instead of the phrase of "carrying away." This alteration is intended to obviate the necessity of an explanation that by "carrying away" is not meant what the words import, but "merely a removal to any distance, however small."

Art 3

Art 4

474. According to the explanation in the Digest the taking and removing together constitute the same thing as is expressed in the Code by the single word "moving," as that is illustrated by the examples subjoined to Clause 363. The "taking" of the Digest is comprehended in the "moving" of the Code. The taking is said to be the act by which the offender has such possession of the thing that he is enabled to remove it. The "removing" is the essential act. The one can scarcely be distinguished from the other, more particularly in the case of driving an animal, where there is in reality no taking, no actual *prehension* or laying hold of the subject of theft prior to its removal. The word "taking" therefore appears to be mere surplusage.

475. By Mr. Livingstone's Code, "Taking alone without carrying "away is sufficient within the definition," and "taking may be either "by a removal, or simply by laying hold upon the article." Article 645. Clause 6. Clause 7.

476. Other alterations of the English law relating to theft, of considerable importance, are proposed by the Commissioners, particularly in respect of the *possession* of property the subject of theft. As it stands, the law, say the Commissioners, makes "possession by the "proprietor essential to the offence," and it makes "a constructive pos-"session by the proprietor sufficient to satisfy the rule, though it be "contrary to the fact, and even although the offender had the actual "possession by delivery from the proprietor." 4th Report p 54.

477. The Commissioners consider the doctrine in respect of possession by the proprietor to be wrong in principle, and they show how the Courts of Criminal law have endeavored to escape from it and "to enlarge the boundaries of the law of theft by forced and subtle "constructions, in order to reach offenders guilty of fraudulently appro-"priating goods entrusted to their possession." They argue that "in "principle possession by the proprietor of the article stolen is not "essential to the offence. For the essence of the offence is the fraudu-"lent appropriation or attempt to appropriate that which belongs to "another; and if the offender fraudulently take what belongs to another, "it is immaterial, except for mere technical purposes, who had, or whether "any one had actual possession of the property at the time of the taking, "so as the offender himself had not possession." "It is only for the "mere purpose of technical description that it is necessary in a prosecu-"tion for such an offence to state whose property was stolen; even this "cannot be invariably required, in as much as it may frequently happen "that although the guilt of the offender can clearly be proved, the owner "cannot be discovered, and it would be absurd that an offender should "derive impunity from a circumstance not essential to the offence. "Such a description of the property is to be given where circumstances "admit of it, as serves to particularize the offence, and afterwards "identify it if need be; but it is obvious that for this purpose the naming "the person from whose actual possession the property was taken, though "he were not the owner, would as well, or even better serve the purpose "intended, than if the owner himself were to be named." Page 52. Page 53

478. The Commissioners propose "to make possession by the "owner in all cases immaterial to the offence of theft, and to embrace "at once, by a direct substantive law, offenders who having lawful "possession of property, are guilty of fraudulent embezzlements;" and their definitions are framed according to this view. Page 54.

479. It will be observed that the definition of theft in the Code does not render it necessary to ascribe the property to any person as owner; the person to be named is "the person from whose actual "possession the property was taken" or attempted to be taken; the matter to be charged is that the offender intending to take fraudulently a particular thing which is property, that is to say a thing over which some person has a right of property, out of the possession of A. B. without the consent of A. B., moved that thing in order to such taking. In the Digest it is expressly declared that "theft may be committed by taking "and removing the property of another although the actual owner be "unknown." It appears to us that the definition in the Code with the separate provision for the fraudulent misappropriation of property *not in possession*, is likely to give rise to fewer difficulties in practice on the points in question than that which is proposed in the Digest.

Digest Chapter XVIII, Section 1, Art. 12

480. Sir H. Seton considers that in Clause 363 "an attempt" has been made "to incorporate all the subtleties of the English law of "larceny in a single definition," and thinks the propriety of the attempt questionable; as also "the adoption of that part of the law of England "which converts the attempt to commit a theft into constructive theft," by the use of the words "moves that thing" in order to the taking thereof.

481. Mr. W. Hudleston observes that the definition describes "an "attempt at that which is theft by the law of England," appearing not to be aware that such an attempt as the definition describes is, as Sir H. Seton remarks, constructive theft by that law. He says "I do not "see any good reason for the alteration involving the abandonment of a "definition to which the people of India have long been accustomed and "perfectly understand, 'the felonious taking and carrying away the "personal goods of another.'"

482. We know not how Mr. Hudleston conceives this definition to have been given to the *people of India*, or how it can be said that they have long been accustomed to it.

483. Mr. Hudleston proceeds to say, "The illustrations (*a*) and "(*b*) are not instances of theft according to any Code that I have seen." With respect to the former illustration, which applies to the "Explana-"tions" (2d and 3d) notifying that things attached to the earth by being severed become capable of being the subject of theft, and that a moving within the meaning of the definition may be effected by the act which severs, the instance being the cutting down a tree, we have shewn that by the Digest as well as by the Code, such a case will fall under theft.

484. With respect to the illustration (*b*) Mr. A. D. Campbell well observes, that Mr. Hudleston must have forgotten Lapier's case cited by Mr. Christian, the Editor of Blackstone, to shew that any the least removal of a thing is a sufficient "carrying away" within the definition given by Blackstone, or to use Mr. Campbell's words, is "with the stretch "of language necessary to justice so usual with the English law quoted by "him (Mr. H.), absurdly strained by it into the falsity of 'carrying away.'"

4 Blackstone, p. 231, Note of the Editor.

485. Mr. Hudleston again remarks of the illustration *m* that it is "questionable," of *u* that it is "absurd," *y* "bad," *z* "worse;" to which Mr. Campbell aptly replies, "these may be extreme cases, but I "do not think they deserve the epithets he (Mr. H.) bestows on them,— "they clearly explain the principle of the new law."

486. The Code differs from the Digest in the "explanation" that "a person may commit theft though he intends to restore the property "after taking it," whereas by Article 30, Section 1, Chapter XVIII. of the Digest, it is declared that "it is not theft where the intent is to "deprive the owner of the temporary possession only and not of his "absolute property in the thing taken." Thus the intent expressed in the definition given in the Digest is "to despoil the owner and fraudu- "lently *appropriate* the thing taken and removed;" while the intent expressed in the definition in the Code is merely to "take fraudulently," that is to say, to take with the purpose of causing wrongful gain to the party taking or some other, by means of wrongful loss to the party from whom the thing is taken, or by depriving him of the benefit which he would have enjoyed from it if it had not been taken from him.

487. This is illustrated by the following example: "A and Z are "gardeners. Z has reared a pine-apple of extraordinary size, in hope of "obtaining a prize. A takes the pine-apple without Z's consent, produces "it before the judges as his own and obtains the prize. He then sends "back the pine-apple to Z. Here, as A took the pine-apple fraudulently, "A has committed theft, though he has restored the pine-apple." A is held guilty of theft because he took the pine-apple from Z with the fraudulent intention of gaining for himself a benefit which Z would have gained by it, if it had not been taken from him, or, in the words of the definition in Clause 16, "with the intention of causing a wrongful gain "to himself by means of a wrongful loss to Z." Mr. Norton finds fault with this illustration on the ground that to construe such a *use* of an article as "theft," involves the meaning of the terms in the text, "intending to take fraudulently," in inexplicable confusion. We think that the illustration, though it is somewhat quaint, sufficiently serves the purpose (*g*)

for which it was intended, and is necessary for that purpose, namely, to shew the application of the principle enunciated in the explanation just adverted to. But we are not agreed as to this principle. One of us is inclined to concur in the opinion of the authors of the Code, conceiving that when a man fraudulently takes and uses as his own, that which does not belong to him, thereby wrongfully depriving another person of the benefit to which he was lawfully entitled from the use thereof, and wrongfully gaining that benefit for himself, he does all that is essential to the offence of theft, and that it is immaterial whether the wrongful possession and wrongful privation be, or were intended to be, temporary or otherwise. The offender in such a case actually "deprives the owner "of the thing taken, and has and deals with it as his own property in "fraud of the owner," and with "intent to despoil him," to use the words of the Digest, (Chapter XVIII., Section 1, Article 27); and it seems to make no essential difference whether he meant to appropriate the thing permanently or not. The other of us is disposed to think that the English Criminal Law Commissioners are right in preserving the restriction which is expressed in the article of their Digest quoted above.

488. Objection has been taken to another illustration (*o*) under this Clause on the ground that the case stated is an attempt to get money by false pretences, or by "cheating" according to this Code, and not theft. The case is stated as follows:—"A takes an article belonging to "Z out of Z's possession, without Z's consent, with the intention "of carrying it back to Z and of pretending to have found it, in the "hope of thus obtaining a reward from Z." This indeed seems to fall within the definition of cheating in Clause 392, viz. "Whoever by "intentionally deceiving any person fraudulently induces the person "so deceived to deliver any property to any person." Here A takes an article the property of Z out of his possession, and bringing it back intentionally deceives Z into the belief that he had found it, and thereby fraudulently induces Z to give him a reward. A cheats Z because Z is led to give the reward by A's false representation that he had done him a service—that there was a quid pro quo. But the case also falls within the definition of theft, because A takes the article fraudulently, that is with the intention of procuring a wrongful gain to himself by means of a wrongful loss to Z, namely, with the intention of fraudulently obtaining a reward from Z as for a service rendered to him which was not rendered.

489 Sir H. Seton observes with reference to the illustration (*w*), shewing how joint property may be taken fraudulently by one of the

joint proprietors from the other so as to be within the definition of theft, that " by the English law theft cannot be committed by a joint pro- " prietor." This is true, except as provided in a late Statute, in the case of members of Banking Co-partnerships, as noted in Article 8, Section 1 and Section 8, Chapter XVIII. of the Digest. The principle of the exception here referred to we conceive to be the same as that which induced the Indian Law Commissioners to frame their definition of theft so as to include cases in which one of two or more joint proprietors fraudulently takes the common property out of the possession of the other or others, intending to appropriate it to his own sole use, or to sell it and appropriate the whole price. The Statute referred to applies when one member of a Co-partnership steals money, &c. belonging to the Co-partnership with intent to injure or defraud such Co-partnership.

490. Among the illustrations of theft in the Code are several, (*l*) (*m*) (*n*), in which the article stolen is the property of the person who commits the theft. By the law of England at present it is theft where the owner takes and carries away a chattel " with a design to despoil the " person having lawful possession of it of all his interest therein by " reason of such possession." " This rule," it is stated, " includes amongst " others, cases where the owner steals from his own bailee, agent or " servant, if either they or any other person would be liable to himself " for the loss." We apprehend that the cases stated in the illustrations above-mentioned would be construed as theft by the law of England, because in each case the person who had possession would be regarded as vested with that special property under which the thing taken might be laid in the indictment as of the goods and chattels of such person. " A bailee, a pawnee, and the like," says Russell, " have such special property."

Digest of the Common Law relating to theft in the First Report of the Commissioners on Criminal Law, p 16

Russell 2, p 155.

Russell 2, p 157

491. But the Criminal Law Commissioners propose to alter the " law on this point, considering that " this is one instance among many " of extending the law of theft beyond the proper limits for the sake of " reaching an offender." Therefore in the Digest of the law of theft submitted in their 4th Report, they introduced an article declaring that " theft cannot be committed by one who is either the sole, or a joint, or a " part owner of the thing taken "

4th Report, Note to Art 22, p. 65.

Article 22, p 65.

492. This is modified in the Digest submitted in the 7th Report, by omitting the words " the sole," retaining " a joint or a part owner." We do not conceive that any difference was intended by this omission, as the Commissioners refer without remark to the note to the article we have quoted from the Digest in the 4th Report, as explaining the new

Article 8, p 244.

rule. We suppose it was thought to be perfectly clear that their definition of the offence did not admit of a charge of theft being brought against a person being the sole owner of the thing taken.

493. Under the definition in the Code, as the ownership does not come into question, it requires no straining to bring within its terms cases such as are exemplified in the illustrations (*l*) (*m*) (*n*); and we think that cases of the kind fall properly under the description of theft, as we find in them what is commonly recognized as the essential characteristic of that offence, namely, a fraudulent taking with intent to despoil, and it matters not, in our view, that the offender is the owner of the thing taken, if he took it fraudulently according to the hypothesis, with intent to despoil the possessor of the interest which he had by reason of his possession, or to cause wrongful loss to him and wrongful gain to himself by such taking.

Page 78. 494. The Commissioners explain in the Notes that they have not made it a part of their definition that the property taken should be of some assignable value, because of the general provision in Clause 73, by which they conceive that the same end is obtained by a different road.

Page 75. 495. Observing that the distinction between "theft," "criminal misappropriation," and "breach of trust," "becomes fainter and fainter as "we approach the line of demarcation and at length the offences imperceptibly fade into each other," the Commissioners point to the provision contained in Clause 61 as calculated to obviate all the inconveniences which might arise from doubts as to the exact limits which separate them.
Page 77. Thus, if a case which is plainly theft comes before a Judge the offender will be punished as a thief. If it is plainly breach of trust the offender will be punished as guilty of breach of trust. If the case be one of those thefts which are hardly distinguishable from breaches of trust, or one of those which are hardly distinguishable from theft, the Judge will not trouble himself with subtle distinctions, but will proceed to sentence the offender under Clause 61 to a punishment common to the penal provisions between which the doubt lies.

496. This meets the objection of Mr. Norton to the illustration (*f*) under Clause 363, there presented as a case of theft, which Mr. Norton says is "to all intents and language" a case of "criminal breach of trust" as defined in Clause 386.

497. The reason why it is brought under "theft" is stated in the illustration, namely, that the plate of Z taken by his butler A, was still

in Z's possession, though also in A's possession. And another illustration is given to point out the difference between "theft" and "breach of trust" in circumstances nearly similar. (g)

498. In the Digest of the English Law Commissioners there is an article containing a provision to the same effect as the illustration to which Mr. Norton excepts. Page 245, Art 21 (f)

499. The framers of the Code observe upon the offence defined in Clause 383, under the designation of "Criminal misappropriation of property not in possession," that it is one which it may be thought they ought to have placed among thefts :—"If we call it theft," they say, "we speak the popular language, if we call it misappropriation of property not in possession, we avoid an anomaly, and maintain a line which, in the great majority of cases, is reasonable and expedient. On the whole we are inclined to maintain this line."

500. Mr. Norton remarks—"It is quite impossible to calculate the limits to which arbitrary constructions may carry the provision of Clause 383, making it a crime *fraudulently* to take into a party's possession property in no person's possession, except he may be altogether ignorant of the superior claims of another person, or of the means of discovering him. It seems to me one of those Clauses suggested by the specific cases exemplified in the illustrations to the Clause." In another place he says, "Few I believe, will concede to the propriety of considering all property which may have been fraudulently taken into possession from no person's possession (except he may be ignorant of any other person's superior claim,) as 'stolen property', (Clause 383) under whatever circumstances so fraudulently taken into possession." It is strange that Mr. Norton should refer to Clause 383 as treating property so taken into possession as "*stolen* property." To his other remarks we shall simply oppose the provisions in the Digest of the English Criminal Law Commissioners which regard cases of this description as falling under the law of theft. By Article 12, Section 1 of Chapter XVIII. under the general head of "*Fraudulent* appropriation," it is declared that "theft may be committed by the taking and removing of the property of another although the actual owner be unknown." By Article 14 it is declared that "where the taking is upon a finding or other casualty, the quality of the act depends on the intention of the party at the time, and it is not theft unless the party took and removed the property with intent to despoil the owner, and fraudulently to appropriate the thing taken, although such owner be unknown."

Clause 365

Clause 367

Clause 366

501. The aggravations of theft of a general nature expressly provided for, are 1st, when it is committed within any building, tent, or vessel, used as a human dwelling, or within any building used for the custody of property, in pursuance of a conspiracy in which a person residing or employed within, and one not residing nor employed within, are engaged; 2d, by a person having made preparation for causing death, or hurt, &c. There is a special provision also for theft on a letter or packet in the possession of an Officer of the Post Office.

502. It is remarked by Mr. A. D. Campbell, who expresses a general opinion that much contained in this Chapter is a great improvement on the English law, especially as regards the more correct definition of offences, and the discrimination of the various degrees of aggravation in the same offence, that it differs from the existing Regulations in not proportioning punishment in offences against property, with reference to the value of the property, and he concludes that this is because it contemplates sentence of restitution or fine equivalent to it, as part of the punishment. Other Officers remark the same difference and object to it as a defect, considering, as one of them expresses it, that it puts the thief of lacs and the thief of a few rupees for want, on the same footing In making this objection the Officers last referred to appear to have overlooked the provision authorizing the imposition of a *fine without* any *limitation* of the amount *in addition to* imprisonment which may extend to three years.

Bengal, 4 of 1820, Sec 4
Madras, 1 of 1825, Sec 9
Bombay, 14 of 1827, Sec 37, Clause 4 *

503. Mr W. Hudleston and Mr. W. Anderson are of opinion that the term of imprisonment ought to be extended. The latter suggests that the limit should be seven years, which is that which now obtains by the Regulations of Bengal and Madras in cases of theft to an amount exceeding 300 Rupees, and in the Presidency of Bombay in cases which, with reference to the amount stolen, fall under the head of "robbery."

Clauses 426-7, 431 2 435-6

504. It is to be observed that when theft is attended with any of the aggravations defined in Clauses 420 to 424, the punishment is cumulative, admitting of additional imprisonment for one year, two years, or three years, as the case may be.

Sir H Seton also questions the propriety of "the separation of house trespasses "from theft, which in so "large a majority of cases "is the sole object of them"

505. Upon this arrangement Mr. Strange remarks that "whatever "is gained by it in critical accuracy, in practice is risked by attempting "to legislate separately for what in effect are integral crimes. To punish "a common act of night burglary, besides making reference to definitions, "recourse must be had to four different Clauses, three of which are far "removed from the first (365,) and an account must be summed up,

* By Section 39 of this Regulation "thefts" are such "robberies" as from the *smallness of the amount stolen* and other reasons may be considered trivial

" before it can be ascertained to what punishment the burglar may be " sentenced." There is an appearance of difficulty as the case is here put, but we do not think it likely that there will be any real inconvenience in practice after the new way is once perfectly understood.

506. Referring to Clause 365, Mr. W. Hudleston says, " I agree " with Mr. J. F. Thomas that a distinction ought to be made between " houses of different descriptions." The following are the observations of Mr. Thomas: " ' Any building or tent used as a human dwelling,' " includes thousands of mud or bamboo huts, with nothing but a grass, " or mat door—wholly insecure and unprotected. I think a distinction " should be drawn between such dwellings, and others of greater solidity, " and duly secured."

" Theft in the one by two or more persons, ought not to be subject- " ed to long and severe imprisonment, unless the thieves are old offenders. " I have known several criminal cases where two persons have com- " mitted theft of some trifling article in one of these insecure huts, " where I should consider rigorous imprisonment uncalled for, especially " in the case of females; and even a month's imprisonment ample for a " first offence, in consequence of the manner in which the property has " been left unguarded, tempting to the commission of the crime."

" I should limit the Clause to buildings used as human dwellings " and for the custody of property, *well* and *properly* secured, and add an " illustration, pointing out, that an open shed, or hut, with a grass or " bamboo mat for a door, is not a building properly secured."

507. The Sudder Court, North Western Provinces, observe that as " tents or vessels" may be used for the custody of property, it does not appear why they are omitted after " building," in the second branch of this definition. They recommend that those words be inserted.

508. We observe that in the Draft of the Code first printed, the words were " any enclosed or covered place used as a human dwelling, or " as a place for the custody of property," and in an " Explanation" of " enclosed and covered space" in a manuscript copy of the Draft in the office, and also written in pencil by the Secretary on the said printed copy, it is notified that " a tent, that part of a ship which lies under " deck, and the cabins of a boat, are within the description." We have not found any note of the reason for the alteration in the revised Draft. We are inclined to think it would be better to insert " tent or vessel" after " building", in the second branch of the Clause as well as in the first, as suggested by the Sudder Court.

509. With regard to the observations of Mr. J. F. Thomas, it is worthy of note that he does not object to "tent" being included in the definition; now the mat or bamboo huts he describes are not of less "solidity" nor less firmly "secured" than tents; and it seems that it would scarcely be consistent to exclude the former for an objection common to both, without excluding the latter also, which no one has recommended. If any distinction were to be made between the huts described by Mr. Thomas and buildings of more solid construction, it would seem that Clause 420 which defines "house trespass" is the proper place for it. In the Clause under consideration, the gravamen of the offence is the conspiracy of a person residing within the building, &c. with another person without, and this does not seem to be affected by any consideration touching the solidity of the building, &c.

510. In Clause 367, the aggravation is having made preparation for causing *death*, or hurt, or restraint, &c. In the analogous provision in Clauses 430, 434, and 438, it is preparation for causing not death but hurt, or restraint, &c. We think that Clause 367 is right, and we do not perceive why it should not be followed in the other Clauses above-mentioned. We observe that in the Draft first printed "death" was omitted in the Clause corresponding with 367. We are inclined to think it should have been added on revision in the other Clauses as well as in this.

Clause 384.

511. It is pertinently asked by Mr. Pelly, why *rigorous* imprisonment is prescribed positively for "theft" while "extortion" is punishable under Clause 369 by imprisonment of *either* description, as is "criminal "misappropriation of property not in possession," an offence which is distinguished from theft merely for the sake of accuracy of definition.

Clauses 368 to 374.

512. As extortion always involves "putting in fear of injury," while theft may be committed, and very often, indeed generally, is committed without any aggravating circumstances, we do not see reason for limiting the discretion of the Court as to the description of imprisonment in the one case more than in the other. In Clause 364 therefore we would substitute "imprisonment of either description" for "rigorous "imprisonment." In the case of aggravated theft to which the other Clauses apply, it seems to be proper to prescribe "rigorous imprisonment" absolutely. In the aggravated cases of "extortion" described in Clauses 371 and 373, we think that "rigorous imprisonment" should be likewise prescribed.

EXTORTION.
Clause 368.

513. The definition of "extortion" in the Code does not differ substantially from the general description of the class of offences brought

under this head in the Digest of the English law, which is given by the Commissioners in their 4th Report, signifying that their distinguishing feature is "the obtaining of property by means of such threats of injury as do not amount to robbery." But the 1st Article in the Chapter under this head does not agree with that general description, inasmuch as the offence therein provided for may be committed by merely sending a threatening letter to a person, with intent to obtain property from him, *although the object may not be effected.* By the Code in every case the person must be "put in fear of injury," and the object must be accomplished, to bring the offence within the definition of "extortion."

Chapter XVIII., Sec. 3, Art. 1. See 7 and 8, Geo. IV., C. 29, Sec. 8, and for India 9, Geo. IV., C. 74, Sec. 82.

514. Mr. Hudleston says of the definition of extortion in the Code, that "the first part appears to describe robbery." Mr. Norton observes, "I believe it will be in vain to seek the distinction intended between "extortion" and "robbery," each offence consisting (at "least in many "instances) in the putting in fear of personal injury and thereby accom-"plishing a theft." The authors of the Code remark, that "There can "be no case of robbery, which does not fall within the definition either "of theft or extortion. But in practice it will perpetually be matter of "doubt whether a particular act of robbery was a theft or an extortion." Here Clause 61 will be found of use. In practice in doubtful cases the offence will be charged in the alternative as "extortion" or "robbery," and the Judge, if the party is convicted, will proceed to pass judgment as directed in the said Clause.

Note p. 79.

515. According to the Digest it is extortion where property is obtained by one person from another "by threat of violence to the person "of any other," "where such offence shall not amount to robbery." According to the Code it is extortion when the object is effected "by "putting any person in fear, for that person or for any other, of death or "of grievous hurt" unless the offence shall amount to robbery; and it does amount to robbery "when the offender at the time of committing "the extortion *is in the presence of the person put in fear*, and commits "the extortion by putting that person in fear of instant death," &c. "to "that person or some other person present at the time," &c.

Page 254, Art. 6.

Clause 371.

Clause 375.

516. It is an offence, but not "extortion," when a person puts another in fear in order to extortion, and specific provisions are made for the punishment of it.

Clauses 370-372 and 374.

517. Mr. H. C. Tucker observes upon the definition of extortion in Clause 368, that the putting in *fear* must be clear, the injury sufficient to compel the act with reference to the age, sex and situation of the person threatened, otherwise complaints of extortion will be continually

brought forward. He thinks the cases in illustrations (*c*) and (*d*) not sufficient. Extortion he conceives should be confined to threats of personal injury for which no subsequent civil proceedings would afford an adequate remedy. Mr. Sharkey is of opinion that there should be a qualification, that the party had no alternative but to comply with the demand, or suffer the threatened consequence. We conceive that it will be a question for the Court whether the injury threatened was such as was likely to produce the effect intended, and whether under the circumstances the party was really put in fear, believing the injury to be inevitable if he did not comply.

518. Colonel Sleeman proposes an additional Clause as follows "—Whoever puts any person in fear of any annoyance to that person or "to any member of his family, by obscenity in language, gesture, or "dress, or by inflicting disgusting wounds on his own person with a "design to extort money, food, or clothing, is said to commit extortion." If it be thought proper to introduce any such provision in the Code, it appears to us that it would come more properly into the Chapter "of "Criminal intimidation, insult, and annoyance."

Chapter XXVI

Article 1, Sec 3
Chapter XVIII

519. It is remarkable that by the law of England, as represented in the Digest, the punishment for an attempt at extortion by sending a threatening letter is punishable with transportation, which may be for life, while the punishment for extortion actually effected by threat, is imprisonment for any term not exceeding three years.

Articles 5 and 6

Clause 371

520. By the Code the highest punishment for aggravated extortion actually effected by putting in fear of death, &c. and by putting in fear of false accusation of an infamous character, is imprisonment of either description for a term which may extend to fourteen years. We have suggested above that the imprisonment should be "rigorous" in these cases.

Clause 373.

521. The punishment for the attempt to commit extortion by so putting in fear is imprisonment, which may extend to seven years.

522. The punishment for "extortion" is the same as in the law of England, namely, imprisonment not exceeding three years.

Of Robbery & Dacoity

523. The definition of robbery is contained in Clause 375. It is "theft" aggravated by actual violence, or by causing fear of *instant* death, &c. or "extortion" aggravated by putting in fear of *instant* death, &c.

524. Mr. Hudleston says he thinks the definition in the law of England preferable, quoting that given by Blackstone. His Colleague, Mr. Campbell, expresses his dissent from this opinion.

Volume 4, p 244.

525. The definition recommended by Mr. Hudleston has not been thought worthy of adoption by the English Criminal Law Commissioners. Their definition is more comprehensive in its terms, but still they have found it necessary to add several explanatory articles.

Chapter XVIII. Section 2, Art. 1.

526. As the law is exhibited in the Digest it agrees in substance pretty nearly with the first part of the definition in the Code "regarding "robbery as an aggravation of theft." The Commissioners observe that "the limits of the offence of robbery have been rendered indefinite by "constructive extensions." They propose to render it more definite "by "limiting the crime of robbery to a taking by personal violence, or threats "of personal violence to the party robbed, or some other person; "and by making the existing law respecting extortion more extensive." We conceive that the arrangement adopted in the Indian Code is preferable.

4th Report p. 67.

527. Mr. Giberne a Judge of the Sudder Court at Bombay, adverting to the definition of robbery in Clause 375, submits that under its terms a gang carrying away property to any amount from a house, if the family have quitted the house on their approach, or have remained quiet within it, so as to render violence unnecessary, would be punishable only under 365, the gang not having caused or attempted to cause death, or hurt, &c. or fear of instant death, &c. But in the case supposed it is to be presumed that the family quitted the house, or remained passive, from fear of the gang, knowing their purpose, and apprehending violence if they remained, or, if remaining, they did not rest quiet, and such fear, doubtless, falls within the definition, as caused by the gang.

Mr. Tyne, another Judge of the Sudder Court at Bombay, makes remarks nearly to the same effect.

528. The Indian Law Commissioners observe that they have provided punishment of exemplary severity for that atrocious crime which is designated in the Regulations of Bengal and Madras by the name of "dacoity." This name they say they have thought it convenient to retain for the purpose of denoting not only gang robbery, but the attempting to rob when such an attempt is made or aided by a gang. The definition of this crime is contained in Clause 376 as follows: "Where "six or more persons conjointly commit or attempt to commit a robbery, "or where the whole number of persons conjointly committing or attempt-"ing to commit a robbery, and persons present and aiding such commis-"sion or attempt, amount to six or more, every person so committing, "attempting, or aiding, is said to commit 'dacoity.'"

Note N. p. 79.

529. Several of the Bombay Officers object to the use of the term dacoity as being little known in that Presidency. It is not in common

use in the Madras Presidency, where, as in that of Bombay, gang robbery is the designation ordinarily applied, and we are inclined to prefer it.

530. The Judges of the Sudder Court North Western Provinces, and Mr. Hudleston and Mr. Campbell, Judges of the Sudder Court at Madras, object to the definition of a gang as consisting of "six or more." Mr. Hudleston suggests three or more. He prefers the definition of robbery by open violence in the Regulations.

531. Mr. Giberne thinks the number of four which constitutes a gang by the law of Bombay is preferable to that here proposed ; he observes that the offence is more frequently committed by five than any other number.

532. Mr. R. N. C. Hamilton referring to the definition of dacoity in Clause 376, observes, "there can be no reason why the union of six "persons for illegal acts when proved should not be punished as severely "as requisite, but that *that* number assembled unattended with aggra-"vating circumstances should constitute the crime of dacoity does seem "unnecessary." This remark as applied to Clause 376 seems to be founded on some misapprehension, for the six persons according to the definition must conjointly *commit*, or *attempt* a robbery; the offence of robbery must be complete, or there must have been overt acts committed plainly manifesting the intention of robbery, and the union of six persons for the commission of the crime is "the aggravating circumstance" which raises the offence to dacoity. The remark is more applicable to Clause 381, which provides for the punishment of persons assembled for the purpose of committing dacoity, a provision which answers to that contained in Clause 4, Section 4, Regulation LIII. of 1803 of Bengal, and the corresponding Regulation of the Madras Code.

533. Mr. J. F. Thomas offers the following observations—"It is, "I conceive, an omission in the enactments on this head, that a distinc-"tion is not drawn between the leaders, those also who are regular "members of an organized gang, and take the active part in dacoities, "and the low tools who are hired for a quarter of a rupee or a few "annas for the night, to swell the numbers of the gang. I was credibly "informed, that in several instances of gang robbery, or dacoity, brought "before the Criminal Tribunals in Tanjore, the majority of the prisoners "were low cultivating serfs, got together at a day's notice, unarmed, who "would receive no share of the plunder, or but some refuse article, and "a few annas."

"In lieu of the provisions in the Code, I would propose, and I "would not leave it discretional with the Courts, transportation, or "imprisonment for life, or fourteen years, in the case of every leader, "every regular member of the gang, every person armed with a weapon "capable of inflicting death, and all who use personal violence in a "dacoity, but, for the great body of the gang, who, in some of our "provinces are often mere Coolies, six or twelve months rigorous "imprisonment, and security from the head of their village on release. "The dacoities of Southern India are not ordinarily like those in "Northern India. For instance, the robbery of guards with treasure, "or of treasuries, and similar daring outrages, are not known. If an "accurate comparison is made between the dacoities which come before "the Nizamut Adawlut in Calcutta, and the Foujdarry Adawlut in "Madras, the distinction between the offence in the two Presidencies "will be clearly seen. The only exception I am aware of, is in the case "of the Hill gangs in the Northern Circars; for it is rarely in other "Districts, and only in the special case of leaders (as Appoo and "Canten) that dacoities assume in this Presidency the same character as "in Bengal, and become the scourge of the country."

"I would also not only recommend a distinction as to the persons "who commit dacoity, but proportion the penalties to the nature of "the dacoity itself. A dacoity in Tanjore was often effected by a body "of men, of whom even the leaders had only sticks in their hands, the "others nothing."

"I would draw a distinction between gang robberies by such means, "when the offenders are not prepared to offer resistance to any armed "person, nor to the Police, and those atrocious cases in which a gang "came well armed, prepared for murder and every violence, and both "purpose, and do resist any force brought at the moment against them."

"Again, I would exclude from dacoity all robberies of grain by "gangs exceeding six, in periods of great scarcity or famine, and treat "such cases as theft, unless committed by an organized gang, and not "by a body congregated on the spur of the occasion in the hope of "obtaining food."

"I would not, further, treat such cases as dacoity, although other "property than grain was taken, if it was clear, that the *main* object of "the great body of plunderers, or of the gang was grain, though they "might be led on to take other things."

534. Mr. A. D. Campbell says, "I agree with Mr. J. F. Thomas "that leaders, or heads of gangs, should be liable to punishment higher "than inflicted on the mere members of the gang."

535. Mr. Giberne would make the heads of gangs of dacoits liable to the punishment of death. He describes the proceedings of such a gang committing a succession of atrocities, and terrifying the population of a whole District:—"At length (he says) the gang is caught, tried and "convicted and punished by the new Code with transportation for life. "Surely in all such cases death is desirable as an example to the "country."

536. Colonel Sleeman proposes an additional Clause, as follows: "Whoever shall be convicted of having been habitually a leader or "leading member of a gang of dacoits, shall be liable to a sentence of "imprisonment for life, or for such limited period as the Court may "deem proper."

537. Lately the law has been altered, and made more stringent even than Colonel Sleeman proposed. By Act XXIV. of 1843—"Who-"ever shall be proved to have belonged to any gang of dacoits shall be "punished with transportation for life, or with imprisonment for any less "term with hard labour."

538. The intention was to apply to dacoity the law in force for the prevention of Thuggee, but it differs in the punishment, as transportation for life is not authorized in cases of Thuggee.

539. If this very stringent law be continued,—and it may be presumed that the grounds upon which it was so recently deemed to be necessary are such as will justify its continuance for the present, though it may be hoped that eventually it may be mitigated,—we would suggest, with reference particularly to the observations of Mr. Thomas as to the constitution of these gangs, that some definition be given of what is meant by a person belonging to a gang of dacoits. The preamble to Act XXIV. of 1843 shews that the phrase is intended to designate, not a person who ordinarily lives by honest labour and who on some occasion has been tempted to join himself to a gang and to take a subordinate part in a robbery committed by such gang in the manner described by Mr. Thomas, but one who has habitually associated with a gang of "professional dacoits," "systematically employed in carrying on their "lawless pursuits in different parts of the country," accompanying them in their expeditions, and actively participating in their operations

540. According to the definition of dacoity in the Regulations of Bengal and Madras, which are identical in this point, it seems that the offence may be committed by a single person going forth *with an offensive weapon* with intent to rob, and actually perpetrating or attempting to perpetrate a robbery, or by a gang with or *without offensive weapons* doing the same. In practice, we apprehend, it is only gang robbery that is accounted dacoity. What number of persons constitutes a gang is not determined. By the law of Bombay robbery "committed by a "number of persons greater than four is gang robbery." By the Code, under the definition of dacoity, and for the purposes thereof, six persons constitute a gang, including any persons present and aiding. In other respects, the definition appears to contain all that is essential in that of the Bengal and Madras Regulations.

Bengal Reg. LIII. of 1803 Sec. 3.
Madras Reg. XV. of 1803, Sec. 3.
Reg. XIV. of 1827, Sec. 36.

541. The punishment of dacoity without murder, by those Regulations, is transportation for life; but "leaders of gangs or other heinous offenders convicted of a repetition of the crime, or without such "repetition of a degree of cruelty, violence, or other aggravating criminality, which under the discretion allowed by the Mahomedan Law "may be punishable with death, and which may appear to the Nizamut "Adawlut to render such heinous offenders liable to capital punishment, "shall be liable to a sentence of death." By the Bombay Regulation, gang robbery accompanied with force is punishable "in any of the "modes specified in Section 3" thereof, which includes death.

Reg. XIV of 1827, Sec 37.

542. By Clause 380 of the Code, if murder is committed by any one of a gang of dacoits, every one of the gang is liable to be punished with death. It does not appear to us to be advisable to extend the punishment of death to any other case. We agree with Mr. Thomas, that there ought to be a great distinction in adjudging punishment between persons proved to be leaders, or regular or habitual members of a gang of dacoits, following the practice of robbery as a profession, and poor coolies enticed to swell the number of the gang occasionally; but we do not think that such persons ought to escape with so slight a punishment as he suggests. We are of opinion that the minimum term of imprisonment may be properly reduced from three years to two years to meet such cases. At the same time we would recommend that the minimum be raised in the case of leaders and persons proved to be habitual members of a gang, and perhaps all who are armed with deadly weapons, from three to seven years.

543. It does not appear to us advisable to exclude from the class of offences designated by the term dacoity, the gang robberies of grain

to which Mr. Thomas refers. Certainly the term dacoity is not very apt as applied to them, but they clearly fall within the definition, and though the higher punishments would be excessive, yet there is a wide enough discretion, especially if the minimum be reduced to two years, to admit of the Judge generally adapting the penalty suitably to the circumstances.

544. It is not a light offence the plunder of grain by mobs, though sometimes there may be circumstances which dictate a lenient dealing with it. Such cases we think ought to be reported, after sentence passed according to the law, for the consideration of those whose prerogative it is to temper the ordinances of the law with mercy.

545. We are disposed to prefer the provision of the Bombay Regulation, by which four or more persons are held to constitute a gang, to that of the Code, by which there must be six or more persons present at a robbery to make it amount to dacoity. We observe that four was the number stated in the Draft of the Code first printed. We do not know why it was altered, but it appears by a Note of the President that the alteration first proposed, was to reduce the number four to three.

546. Mr. B. Hutt observes that assisting in murder in dacoity, may be visited, under Clause 380, with less punishment than where simple murder is committed, the *minimum* in the former case being rigorous imprisonment for seven years, in the latter imprisonment for life.

Clause 97

547. By the provisions under the head of "abetment" any one aiding the commission of an offence is liable, if that offence be committed, to the punishment provided for that offence; and if in an attempt to commit any offence, a different offence is committed, any person aiding the commission of the offence first mentioned, is liable to the punishment of the offence actually committed, if he knew it to be likely that such offence would be committed. Under these rules a person aiding a dacoity, if murder were committed by one of the gang of dacoits in committing the dacoity, would be liable to imprisonment for life, at the least; and we see no reason why any one, under the circumstances described in Clause 380, should escape with imprisonment for seven years. We think the penalties should be the same as in Clause 300.

548. It has been observed that Clause 382 will be nugatory in cases of dacoity when the sentence for that offence is transportation or imprisonment for life. It appears to us that it is not required at all as regards dacoity, as the Clause relating to that offence sufficiently

provides for the aggravation contemplated in Clause 382. In determining whether the offence shall be visited with transportation for life, or imprisonment for life, or for any shorter term down to the minimum prescribed by Clause 380, the Judge will of course take into consideration whether any person has been hurt or not, or whether there has been any other aggravation, and will pass sentence accordingly. We would suggest therefore, that the words "or in committing dacoity" be struck out of Clause 382 and that the Clause itself be transposed, so as to follow immediately after Clause 378.

CRIMINAL MISAPPROPRIATION OF PROPERTY NOT IN POSSESSION.

Clauses 383 to 385.

549. We have already* noticed the reasons for separating the offence under this head from theft, and the remarks of Mr. Norton upon "the provision of Clause 383." Mr. Sharkey contends that the offence "is clearly theft," and considers the reasons given in the note for not so designating it as "more fanciful than substantial." It does not appear to us that his objections are well founded.

550. Mr. Greenhill appears to us to be right in thinking that a person appropriating part of a wreck, or goods washed ashore, would commit an offence under these Clauses.

CRIMINAL BREACH OF TRUST

Clauses 386 to 388.

551. Sir H. Seton questions "the expediency of multiplying "offences to the extent that they would be created by this Clause." (386) "The effect of it," he observes, "would be to convert a large portion of "what has hitherto been equitable jurisdiction into criminal." "It was "the mixture of equitable and criminal jurisdiction," he adds, "that "led to the abolition of the Star Chamber."

Messrs Giberne and Greenhill.

552. The principle of the provisions under this head appears to be approved, on the other hand, by the Sudder Court for the North Western Provinces, and by those Judges of the Sudder Court of Bombay who have noticed it, and is not objected to by any of the Judicial Officers of the Company.

553. The title of "criminal breach of trust" in this Code takes the place of "embezzlement" in the Digest of the English Criminal Law Commissioners.

Par 478.

554. We have mentioned above the reasons of the English Commissioners for "embracing at once by a direct substantive law, offenders "who having lawful possession of property are guilty of fraudulent "embezzlement."

* Supra, par 499 and 500.

Chapter XVIII, Sec 6, Art 1

555. According to the Digest—" Whosoever being intrusted with " the possession of any moveable property or fixture, being of the " property of any other person, on any contract of hiring, or as deposit, " pledge or security, or for the purpose of keeping, carrying, or repair- " ing, or other purpose whatsoever, under an obligation to return, deliver " up, or specifically apply the same, shall, with intent to defraud the " owner, and in violation of such trust, embezzle such property or " fixture," shall be liable to the punishment for embezzlement. The

Art 2

term " embezzle" is explained " to comprehend any actual appropriation " by the offender of the property to his own use, or otherwise, to the " despoiling, and in fraud of the owner."

556. By the Code, " criminal breach of trust" is committed by a person who " intending fraudulently to cause wrongful loss or risk of " wrongful loss to any party for whom he is in trust, disobeys any direction " of law prescribing the mode in which such trust is to be discharged, or " violates any legal contract express or implied which he has made " touching the discharge of such trust with any party from whom such " trust was derived."

Arts. 1 to 13

557. There would not be a material difference between the law of " embezzlement" in the Digest, and that relating to " criminal breach of trust" in the Code, but for a special provision in the former which declares that it shall " not affect any trustee in and under any instru- " ment whatever." This provision is taken from the Statute 7 and 8,

Art 14.

Geo. IV. Chapter 29, Section 50, corresponding with 9 Geo. IV. Chapter 74, Section 103, for India, which Sir H. Seton probably had in view in making the observation above quoted.

558. We are unable to perceive any good reason for exempting trustees, so called technically, from penal responsibility for acts done by them fraudulently for their own gain to the despoiling of the party for whom they are in trust, or, in the phraseology of the Code, with the intention of causing wrongful gain to themselves by means of wrongful loss to the party for whom they are in trust, more than such parties as are described in Article 13 of the Section of Embezzlement in the Digest, and Section 49 of the Statute above mentioned, (also 9 Geo. IV., Chapter 74, Section 102) who being intrusted with property as agents, convert such property to their own use or benefit.

559. With reference to Sir H. Seton's remark that " it was the " mixture of equitable and criminal jurisdiction that led to the abolition

" of the Star Chamber," we may notice what Hallam says of the origin of this part of the jurisdiction of the Star Chamber. " Every misdemeanor" he states " came within the proper scope of its enquiry, those especially " of public importance, and for which the law, as then understood, had " provided no sufficient punishment. For the Judges interpreted the law " in early times with too great narrowness and timidity; defects which, " on the one hand, raised up the over-ruling authority of the Court of Chan- " cery as the necessary means of redress to the civil suitor who found " the gates of justice barred against him by technical pedantry; and on " the other, brought this usurpation and tyranny of the Star Chamber " upon the kingdom by an absurd scrupulosity about punishing manifest " offences against the public good. Thus corruption, *breach of trust*, " and malfeasance in public affairs, or attempts to commit felony, seem " to have been reckoned not indictable at common law, and came in " consequence under the cognizance of the Star Chamber."

Constitutional History, vol. 1, p. 442-3.

560. Blackstone observes that " into the Court of King's Bench " hath reverted all that was good and salutary of the jurisdiction of the " Court of Star Chamber." But it seems that the observation requires to be qualified, since from a " *scrupulosity*" touching matters which civilly belong to the domain of equity, " offences manifestly against the public good" have been suffered to go unpunished, that beneficial part of the Criminal Jurisdiction of the Star Chamber relating to breaches of trust not having been assumed by, or vested in the Court of King's Bench. There is no reason for such scrupulosity in India, where except within the limited sphere of the Queen's Courts the distinction between equitable and legal rights is unknown.

561. It is strange that Mr. Greenhill objects to the introduction of the term " fraudulently," which is intended to stamp the character of the transactions embraced by the Clause in question, as " weakening the whole." Another Officer, Mr. T. Blane, proposes to " include the " *malicious* intention of causing loss as well as the *fraudulent* intention, " as where a servant to injure his master suffers his property to be spoilt " although he gains nothing by it."

562. We need hardly say that neither the omission nor the addition proposed appears to us advisable.

563. Mr. Giberne observes that hitherto the offence defined in Clause 386 has been punishable by imprisonment for seven years, and that the proposed penalty of imprisonment which may extend to three years,

appears to him insufficient. The punishment is that prescribed for simple theft, except that for the latter the imprisonment is ordered to be rigorous. We have suggested that it be left to the discretion of the judge to determine whether the imprisonment should be simple or rigorous in cases of theft, as it is with regard to this offence. By the Digest the punishment for embezzlement, where the property is worth less than 1£, is imprisonment not exceeding two years, where the value amounts to 1£ the offender may be sentenced to transportation of seven years, or imprisonment not exceeding three years.

564. The Sudder Court for the North Western Provinces suggest that provision should be made for a severer punishment in certain instances of common occurrence in the Mofussil, such as that of confidential persons employed by bankers to convey remittances in specie, appropriating the money to their own use, and alleging that it has been taken from them by robbers. This mode of sending remittances, they observe, is very general, and the offence is of so serious a complexion as to demand a heavier penalty than that contemplated. We incline to the same opinion, and would advise that the maximum term of imprisonment be not reduced below that which may be inflicted under the existing laws of the Company's Courts, namely, seven years.

565. Mr. Bacon referring to Clauses 366 and 388, observes that any person stealing a letter from the Post Office, and a Clerk of the Post Office misappropriating the contents of a letter in his charge, are made liable to the same punishment, though there is no comparison between the degrees of criminality. The punishment awarded in Clause 388, he says, "must be allowed to be quite inadequate." We observe that by the Digest servants of the Post Office are made liable to transportation for seven years, or imprisonment not exceeding three years, for stealing a letter, and to transportation for life, or for a term not less than seven years, or imprisonment not exceeding three years, for stealing money out of such letter. And that the latter punishment may be inflicted on any person stealing money out of a post letter, or stealing a post letter from a post letter bag or a Post Office. It seems to us proper that there should be a distinction, as suggested by Mr. Bacon, between persons stealing post letters, not being servants of the Post Office, and persons being servants of the Post Office, misappropriating letters, &c., entrusted to their keeping.

Chapter XIV., Sec 6, Art 3.

Art 4.

Art 5.

566. For the latter offence the term of imprisonment might be extended to seven years.

567. Upon Clauses 389 and 390 Mr. J. F Thomas makes the following observations:

" These provisions I consider to be wholly inadequate to the offence, " when it has been committed by an habitual or professional receiver, by " an Officer of Police, by a servant of the party robbed, by persons who " keep houses of ill fame, or for the sale of spirituous liquors, when the " amount is large, or by a party who is known to organize and originate " plans for robbery, and habitually lives on plunder. In such cases the " interests of society require heavier penalties than those provided, and " they should be made imperative."

568. Mr. W. Hudleston and Mr. A. D. Campbell, Judges of the Madras Sudder Court, concur in opinion that the aggravations of *receiving* recognized in Regulation VI. of 1822 of the Madras Code are proper, and should be provided for. Mr. Campbell particularly refers to habitual and professional receivers.

569. Upon Clause 390 the Sudder Court, North Western Provinces, observe, that the punishment does not appear sufficient to meet cases in which the stolen property may have been obtained by highway robbery, or theft attended with murder or poisoning, in respect to which the Court are of opinion that a higher measure of punishment is required.

570. Mr. Giberne and Mr. Pyne, Judges of the Bombay Sudder Court, think the proposed punishments too lenient.

571. Mr. Greenhill, another Judge of that Court, suggests that in Clause 391 " Thuggee" should be introduced before or after " Dacoity." Mr. A. Bell thinks the punishments too lenient, and suggests that the receiver should be punished equally with the thief.

572. The principle which Mr. Bell recommends appears to have been followed in Clause 391 in regard to dacoity, the punishment for " receiving property stolen in the commission of dacoity" being the same as for dacoity, and we think the application of it may properly be extended to robbery.

573. It seems to us advisable also to make a special provision for the punishment of common receivers of stolen property, upon a second conviction of receiving specific property known to have been stolen, &c., with imprisonment to seven years.

Chapter XVIII., Sec 7, Art 1

By the Statute for India, Sec 107, fourteen years.

Art 2

Stat. for India, Sec. 108, seven years.

574. The punishment proposed in the Digest for receiving property known to have been fraudulently taken, when the fraudulent taking is punishable as theft, or with transportation, is transportation for a term not exceeding fifteen years, nor less than seven years, or imprisonment not exceeding three years, with whipping (if a male); and for receiving property fraudulently taken, but where the original offence is not punishable as theft, transportation for seven years, or imprisonment not exceeding three years, with whipping (if a male.)

OF CHEATING

Note N page 79 to 84

575. The authors of the Code have explained at large their views regarding the offences which are brought under this head.

576. They shew that while there are many deceptions committed for the sake of gain which ought to be punished, there are many such deceptions which however immoral are not offences within the scope of this Chapter. The line they have drawn is "to make it cheating to "obtain property by deception in all cases where the property is fraudu- "lently obtained, that is to say, in all cases where the intention of the "person who has by deceit obtained the property was to cause a distri- "bution of property which the law pronounces to be a wrongful distri- "bution, and in no other case whatever." "It appears to us," they say, "that the line which we have drawn is correct in theory, and that it is "not more inconvenient in practice than any other line which can be "drawn while the Civil Law of India remains in its present state, and "that it will be unexceptionable whenever the Civil Law of India shall "be ascertained, digested, and corrected."

577. "Whether the principle on which this part of the law is "framed be a sound principle," they proceed to remark, "is a question "which will be best determined by examining, first, whether our defini- "tion excludes any thing that ought to be included, and, secondly, "whether it includes any thing which ought to be excluded." They think "it can scarcely be contended that their definition excludes any "thing that ought to be included." And we do not find any objection to the definition on that ground. But they anticipate objections on the ground that the definition includes much that ought to be excluded. "It certainly includes," they observe, "many acts which are not punishable "by the law of England, or of France," for instance, they say, "we "propose to punish as guilty of cheating a man who, by false represen- "tations, obtains a loan of money not meaning to repay it; a man who, "by false representations, obtains an advance of money, not meaning to "perform the service, or to deliver the article for which the money is "given, a man who, by falsely pretending to have performed work for

" which he was hired, obtains pay to which he is not entitled." " In all " these cases," they observe, "there is deception. In all the deceiver's " object is fraudulent. He intends in all these cases to acquire or retain " wrongful possession of that to which some other person has a better " claim, and which that other person is entitled to recover by law. In all " these cases therefore the object has been wrongful gain, attended with " wrongful loss. In all therefore there has, according to our definition, " been cheating. We cannot see why such acts as these should be treated " as mere civil injuries, why they should be classed with the mere non- " payment of a debt, and the mere non-performance of a contract."

578. The above observations have reference particularly to the illustrations (*g*) (*h*) (*i*) subjoined to Clause 392, upon which Sir H. Seton has a note questioning the propriety of " the conversion of so " many civil injuries into criminal offences, and this without any reser- " vation of the civil remedy."

579. The observations we have quoted shew good cause, in our opinion, for bringing the cases in question within the scope of the Penal Law. Although the civil remedy is not in express terms reserved, there is nothing which appears to us to imply that it is taken away, and we do not understand that this was intended.

580. Mr. Norton is one of those who think that the definition in Clause 392 includes too much. " A host of trivial illegal acts," he conceives, " may be brought within the vortex of this text, and many in no " sense criminal."

" The illustrations in most instances," he observes, "are cases of " deception in respect to the parties' *future intentions* which of course " are incapable of proof, and are, many of them, of a quality so little " allied to criminality as to excite ridicule, such as cheating by obtaining " money under a *deceptive promise to repay it.*"

581. Here, as in other places, Mr. Norton hazards general remarks which will not bear the test of examination. Every one who reads the illustrations will see that they are not in *most instances* "cases of decep- " tion in respect to the parties' *future intentions.*" Strictly speaking there is not one such case, and out of ten illustrations of cheating there are only two in which *the deception is prospective*, relating to something which the party deceived is led to expect will be done in future by the party deceiving him. In these cases the offence turns upon its being the *present* intention of the latter not to do what he deceitfully leads the

other party to expect he will do The cases referred to are the illustrations (*g*) (*h*), particularly adverted to in the remarks above quoted. Of these the illustration (*g*) is the one which Mr. Norton points out as an example of the " many" which he describes as " of a quality to excite " ridicule."

582. With regard to this illustration of the definition in Clause 392, the authors of the Code make the following further remarks:

" Some persons may be startled at our proposing to punish, as " a cheat, every man who obtains a loan by making promises of pay- " ment which he does not mean to keep. But let it be considered that " a debtor, though he may have contracted his debts honestly, though it " may be from absolute inability that he does not pay them, though his " misfortunes may be the effect of no want of industry, or caution, on " his part, is now actually liable to imprisonment. Surely it is unrea- " sonable to detain in prison the man who, by mere misfortune, has " involuntarily violated the rights of property, and to leave unpunished " the man who has voluntarily, and by wilful deceit, attacked those " rights, if only he is lucky enough to have money to satisfy the demands " on him."

583. After giving an example to illustrate their views they proceed as follows:

" It would be improper for us here to discuss at length the " question of imprisonment for debt. But it seems clear that whether " it be or be not proper, that a debtor, as such, should be imprisoned, a " distinction ought to be made between the honest and dishonest debtor. " We are inclined to believe that the indiscriminate imprisonment of all " debtors would be found to be unnecessary if this distinction were made." In conclusion they say, " We are satisfied that the only way to get rid " of imprisonment for debt, as debt, is to extend the penal law on the " subject of cheating in a manner similar to that in which we propose to " extend it."

584. The sentiments here expressed by the Indian Law Commissioners are in accordance with the views of the Commissioners on the Courts of Common Law in England set forth in their 4th Report, relating to imprisonment for debt. " Whilst we recommend," they say, " that " alterations should be made in the law of arrest favorable to the personal " liberty of the honest debtor, we also think it essential that provision " should be made for the more effectual punishment of dishonest and

Page 43.

"fraudulent debtors." They observe that the power with which the Insolvent Court is invested of punishing such frauds is limited, and, constituted as that Court is, they think it ill calculated to act as a Court of Criminal jurisdiction. Their conclusion is that "a debtor ought to be "liable to a *criminal prosecution*" "in the following among other cases, "namely, where he has obtained credit by means of any false act, pre-"tence, or representation, whatsoever."

585. This in effect is just what is proposed in the Indian Code as explained in the Note, and exemplified by the illustration which Mr. Norton deems ridiculous. Page 84

586. The recommendations of the Common Law Commissioners were adopted by the Commissioners on Bankruptcy and Insolvency in a Report made by them in 1840; and the Chancellor, Lord Cottenham, in 1844, brought a Bill before the House of Lords to give effect thereto, in which, His Lordship stated in his speech, was a provision that persons guilty of fraud should be proceeded against criminally and tried by a Jury. Newspaper report of Speech of Lord Cottenham in House of Lords, 10th April 1844.

587. It appears from the report of the Debate on this occasion that the Bill was approved in principle by all the Law Lords, but it would seem that some impediment afterwards arose owing to which it has not yet passed into a law.

588. In the Digest of the English Criminal Law Commissioners the provisions on the subject matter are distributed under two distinct heads, viz:

1st. "Obtaining property by false pretences." 2d. "Cheats and "other like fraudulent practices," the latter including "false personation," which is defined as a mode of cheating in Clause 393 of the Code with a specification of the ways in which the offence may be committed. Chapter XVIII., Sec 4. —5.

589. The definition under the 1st of these heads, viz. "Whosoever "shall by any false pretence obtain any moveable property from any "other person with intent to cheat or defraud any other person," differs little apparently from that contained in the first sentence of Clause 392 of the Code, viz. "Whosoever by intentionally deceiving "any person fraudulently induces the person so deceived to deliver any "property to any person." Sec 4, Art 1.

590. Upon the illustration (*k*) to Clause 392, Sir H. Seton observes—"Here the criminality of the act is made to depend upon the

"meaning of fraud; the meaning of fraud is made to depend upon the "meaning of wrong; and the meaning of wrong is made to depend on "the decision of a civil tribunal."

591. An explanation is subjoined to the illustration intimating that if the deception practised upon A were such that Z has a legal right to have back the price paid by him, there is wrongful loss and wrongful gain, (that is, according to the definition in Clauses 15 and 28, a loss which the loser may recover, and a gain which the gainer may be compelled to yield by a civil action,) and if A *intended* to cause such wrongful loss and wrongful gain he has acted fraudulently (Clause 16) and has cheated. It is to this explanation that Sir H. Seton alludes. But his remark is not strictly accurate that the meaning of wrong is made to depend on the decision of a civil tribunal; it rather depends upon the rule by which the civil tribunal must decide.

Clause 394.

592. The punishment of "cheating" is imprisonment of either description which may extend to one year, or fine, or both.

Clause 395.

593. It is properly treated as an aggravation of "cheating" when the person cheated is one whose interest the cheater was bound to protect, and the punishment is double.

594. "Cheating by personation" is also liable to double the punishment for "cheating."

595. We are not satisfied that "cheating by personation" is an offence of so much more importance than "cheating" committed in some of the ways indicated in the illustrations to Clause 392, for example in the manner described in the illustration (*a*), that it ought to be made liable to a degree of punishment so much greater.

596. In the Digest of the English criminal law cheating by personation* is liable to a less punishment than cheating by false pretences generally.† The punishment for both however exceeds the punishment for simple theft.‡ Whereas the Code makes the punishment of theft§ three-fold of that prescribed for cheating.

597. It appears to us that the punishment for "cheating" should be increased to two years at least, which is now proposed for "cheating by personation," and that the latter offence should not be distinguished from the former in the degree of punishment. We would leave the aggravation described in Clause 395 liable to double the punishment for

* Imprisonment not exceeding three years, Ch. 18, S. 5, Art. 1.

† Transportation for seven years, or imprisonment not exceeding three years, S. 4, Art. 1.

‡ Imprisonment not exceeding two years with whipping (if a male,) S. 1, Art. 54.

§ Imprisonment not exceeding three years, Cl. 364.

simple cheating, that is if our last suggestion should be adopted, to imprisonment which may extend to four years.

598. The authors of the Code remark that the provisions under this head "are necessarily imperfect and must remain so, until the whole "of this important part of the law has undergone an entire revision."

Of Fraudulent Insolvency. Clause 398.

Note N. p. 84.

599. The offence defined in Clause 398* is provided for, among others, by Section 57 of the Insolvent Act for India, 9 Geo. IV. Clause 73, by which it is made punishable by protracted confinement, for such a period not to exceed three years in the whole, as the Insolvent Court shall direct, to be computed from the date of the Insolvent's petition for relief. The punishment proposed in the Code is imprisonment which may extend to seven years, and must not be less than one year, to which fine may be added.

* An Insolvent removing, concealing, or otherwise disposing of property in order to prevent the distribution of that property according to law among his creditors.

600. It appears to us that the offence in question is properly made subject to the Penal Law on the principle advocated by the Common Law Commissioners in the Report to which we have already referred, and which has been actually adopted in the latest Act of Parliament on the subject in force in England.

7 and 8 Vict. C. 96, S. 39.

601. Of the other fraudulent acts described in the Section of the Indian Insolvent law we have referred to, some appear to be punishable under different heads of this Code. Thus the falsifying of books for the purpose therein mentioned seems to fall under Clause 189, which provides for "fabricating false evidence," and the withholding of the books, &c. under Clause 156. The fraudulent destroying of books, &c. by an Insolvent for the same purpose we conceive may be brought under "mischief" as defined in Clause 399.

602. We are not aware why the provision in this Clause of the Code is confined to traders, nor why the punishment is extended beyond what is authorized by the present law for the government of Her Majesty's Courts in India, and what, we observe, is authorized in the late Act of Parliament just adverted to. We would make Clause 398 applicable to all Insolvents, and limit the punishment to imprisonment for a term not exceeding three years, which is the punishment for stealing.

603. This title corresponds to that of "malicious injuries to property" in the Digest of the English Criminal law.

Of Mischief. Clauses 399 to 417. Chapter XX.

604. In the 4th Report of the English Criminal Law Commissioners it is explained that "This class of offences is characterized by malice as

Art. 100, p. 84.

"contradistinguished from fraud." Again by Article 4, Section 3, Chapter I. of the Digest it is explained that "an act is maliciously done or omitted "to be done, where being prohibited to be done it is wilfully done, or "being commanded to be done it is wilfully omitted to be done" "without "lawful justification or excuse." And by Art. 5 that "Malice in fact or "express malice consists in some actual intention to cause hurt, damage "or injury."

605. It appears to us that the definition of "mischief" in Clause 399 agrees essentially with what is meant by the phrase "malicious injuries to property" according to the above explanations.

606. Mr. Norton however strongly objects to the definition in Clause 399 on account of the wide scope which it gives to the offence of doing mischief, so wide, he remarks, that "it includes arson and the scuttling of ships." So wide also, we observe, is the Chapter of "malicious injuries to property" in the Digest, the first article of which provides for the offence of "arson,"* and the fifth article "for the scuttling of ships," or damaging ships otherwise than by fire, with intent to destroy or render them useless.

* See also Note p. 88, 7th Report.

607. Upon the illustrations of "mischief" in the instances (*e*) and (*f*) under Clause 399 of ships being cast away voluntarily, Sir H. Seton remarks that "by the English law these are capital offences *where life is endangered.*" This is true, but then the offence with this aggravation falls under a different Chapter, that of "offences against the person." The arrangement is the same in the Code, and where death is caused by casting away a ship, the same having been done with the intention of causing death or with the knowledge that death was likely to be caused thereby, we apprehend that the offence is capital under Clause 294. It is not capital where death has not been caused, in which the Code differs from the English law. We conceive that if the circumstances were such that the offender would be liable to capital punishment under Clause 294 if the death of any person had been caused by the casting away of the ship, he would be liable at any rate to transportation for life under Clause 308. On the most lenient view of death caused by the wilful casting away of a ship, the offender would be liable under Clauses 304 and 305 and Clause 415 to imprisonment for a term extending to sixteen years.

Digest Chapter XV Sec. 5, Art. 4.

By Clause 415, 14 years
304, 2
16

608. In laying down the punishment for different degrees of the offence of mischief, the gradation observed refers to the amount of loss sustained, a mode of distinction not admitted in estimating the degrees of criminality in other offences against property. Clause 400 we

conceive applies to cases in which the loss is under five rupees,* cases in which the loss amounts to five rupees and upwards being provided for in Clause 402,† and cases in which the loss is rupees 100 or more in Clause 403.‡ We think there is no sufficient reason for the distinction between Clauses 400 and 402. We would modify the latter Clause so as to comprehend the cases for which the former was intended, and omit Clauses 400 and 401.

* Fine simply to 10 times the loss.

† Imprisonment to six months, or fine or both

‡ Two years, or do do.

609. Referring to Clause 404, Sir H. Seton puts the case of "A, a "collector, having a duplicate specimen, and destroying it in order to "enhance the value of the remaining one," and asks "is he to be punished"? We think not, for there is no "mischief" committed, since the collector does not destroy the duplicate specimen "intending thereby to "cause wrongful loss to any party." Mr. Norton points to Clause 405 as exemplifying two objections taken by him to the provisions of the Code under this head—which he characterizes as "extending criminality to acts "of mischief not involving other specific crimes,"—namely, that they "can "only be defended on the principle of making every species of civil "injury a public crime," and that "the punishments are out of all reason "severe." This Clause, he observes, "enacts to the possible extent of "rigorous imprisonment for two years for committing any 'mischief' "(which may be by diminishing the value of any property intending to "cause wrongful loss to any party) with the deliberate intention of "*annoying* the person to whom the wrongful loss is intended."

610. He refers to Clause 408 as another example liable to the same objections. This Clause he describes as "enacting to the possible extent "of like imprisonment for an attempt to commit mischief on any road "intending to render it less easy to travel by it" It is surprising that Mr. Norton should cite this as an instance of a mere private civil injury converted into a public crime, it being obvious that the essence of the offence is the injury caused by it, not to an individual but to the public, and it surely is a public injury to do such mischief to a road as "to "make it less safe or easy to travel, or to convey property by it." With respect to Clause 405 it is to be observed that the annoyance is an aggravation of mischief committed in some way within the definition in Clause 399. We have already remarked that this definition corresponds in essential points with the characteristics of "malicious injury to property" in the law of England.

611. The provision made by statute for the offence of destroying or damaging trees or shrubs in parks or pleasure grounds, is analogous to that in Clause 405 objected to by Mr. Norton. In both cases there

is injury to property and wrongful loss thereby, but the gravamen is the annoyance to the individual, to which his *loss* is nothing in comparison.

612. It is objected to Clause 406, that by determining that the value of the animal or animals, the destruction or injuring of which constitutes the offence here provided for, must be 10 Rupees or upwards, there will be excluded a multitude of cases which ought to be included, as a large proportion of the animals belonging to the poor, and of importance to them, are of less value than 10 Rupees. The value ought to be 4 or 5 Rupees, says one Officer, for half the Tattoos and Cows, to say nothing of the Sheep and Goats in India, are not worth more than 5 to 10 Rupees each. Mr. J. F. Thomas, one of those who urge the objection here noticed, observes that the specification of Cattle in Clause 406, and the absence of all reference to animals in the illustrations to Clause 399, have given rise to a doubt in his mind whether poisoning Cattle is included in Clauses 400 and 401, and if not, the question arises, is the offence of poisoning Cattle under 5 Rupees value provided for at all?

613. We see no reason for the doubt entertained by Mr. Thomas, as the definition in Clause 399 is so general, that the destruction or injury of any animal, being property, by *any means* by which it was intended to cause wrongful loss to any party, and of course by means of poisoning, must by every rule of construction be held to fall within it. The offence being within the definition will be punishable as the Code stands, if the value of the animal is less than 5 Rupees under Clauses 400 and 401,—if it amount to 5 Rupees or upwards but less than 10 Rupees, under Clause 402,—if it be 10 Rupees or upwards under Clause 406.

614. Under Clauses 413 and 414 which provide for "mischief by "fire" "to buildings," Mr. J. F. Thomas observes as follows—"The grass "or mat huts of the lowest classes are placed on a level with the "substantial, secure, and valuable dwellings of the better classes. The "penalty, considering the injury in the case of these frail dwellings, is "altogether disproportionate, and if, as in Clause 415, a limitation is "made to decked vessels, so I conceive a limitation similar in its "character should be made in the case of houses."

615. It is obviously proper that in the case of mischief by fire a distinction should be made between the huts described by Mr. Thomas and substantial houses, but there is sufficient room for such a distinction between the maximum of 14 years and the minimum of 1 year, and between rigorous and simple imprisonment, under Clause 413, and we think it best that the distinction should be left to the discretion of the Judge

616 Upon Clause 414, which makes it an aggravation of mischief by fire to buildings, that the person committing the mischief "intended or "knew it to be likely that buildings ordinarily used as human dwellings "*to the number of not less than* 5, may be consumed," Mr. G. W. Bacon "says—"In the close-built and combustible villages of this country, fire "rarely contents itself with the destruction of one house, and whatever "may be the intention of an incendiary, and whatever he may know to "be likely, the man who puts fire to one house will in all probability burn "half the village, and his crime is the same whether he meant to stop at "one house, or to go on to not less than 5. I would extend the punish-"ment in Clause 414 to all malicious burning of dwellings, or out-houses, "or vessels, and proportion the punishment to the probability of "extensive mischief."

617. It certainly appears to us unadvisable to make the conviction of the incendiary under Clause 414 depend upon his intending, or knowing it to be likely, that five houses at the least may be consumed in consequence of his act. As Clause 413 applies to mischief by fire committed with the intention of destroying a single house, Clause 414 might be worded so as to apply to mischief by fire committed by a person intending, or knowing it to be likely, that *more than one* house may be consumed.

618. The Sudder Court for the North Western Provinces observe, with regard to Clauses 413 and 414, that they do not see any notice of occasions in which death may be caused in the commission of mischief by fire, though the proper punishment is perhaps provided for by some other Clause in the Chapter of "offences against the human body." This conjecture is right. The remarks we have made with respect to death caused by the casting away of a ship, or in the commission of any offence under Clause 415, apply equally to death caused in the commission of the offences defined in Clauses 413 and 414.

619. With reference to 415, Mr. G. W. Bacon observes that "A "great proportion of the vessels in this country are not decked, and "mischief may be as easily committed in these as in the others;" and Mr. Pyne, Judge of the Bombay Sudder Court, states that "the chief part of "the coasting trade, also the Mocha trade, is carried on in vessels not "decked." This is an important fact, for we imagine that Clause 315 was intended to embrace all sea-going vessels. In the Bay of Bengal, the Dhonies or native coasting craft, we believe, are for the most part decked, but if, as appears from Mr. Pyne's statement, the native craft of the Western Coast of India, and that which navigates the northern part of the Indian Ocean to the Red Sea do not come under that description,

it is fit that the definition should be enlarged so as to comprehend them as well as the larger river craft, to which probably Mr. Bacon's remark is meant to apply. In the corresponding article in the Digest of the English Criminal law the words are "any ship or vessel."

620. The Sudder Court for the North Western Provinces suggest that there should be a provision corresponding with Clause 414 in regard to vessels, but it does not appear to us to be required.

621. In Clause 416 the aggravation is the same as in Clause 367 relating to theft, namely, preparation to cause death, &c., but the punishment in the former is imprisonment of either description limited to three years, whereas by the latter the imprisonment is rigorous and may extend to seven years. We see no reason for this difference, and would suggest that Clause 416 be altered to agree with Clause 367, both as to the extent and the nature of the imprisonment.

622. We are not aware of the intended application of Clause 417. It seems to us, as far as we can see, unnecessary.

623 While Mr. Norton exclaims against the severity of the punishments for mischief as out of all reason, several of the Officers in the Mofussil object to them as inadequate from their leniency. We are not prepared to suggest any alteration except what we have just proposed, and that for the offences defined in Clause 410, and in Clauses 412, 413, and 415, the imprisonment be rigorous.

Of Criminal Trespass

624. Clause 418 contains a definition of "trespass," which, as explained in the Note N., "is the name given to every usurpation how-"ever slight of dominion over property."

625. Exception is taken to the term "dominion" as it is used in this definition. Sir H. Seton questions "whether in any of the cases "put (by way of illustration) dominion can be properly said to be "exercised." Mr. Norton says "I know not what is meant by *dominion*"; "can dominion," he asks, "be exercised without any actual meddling "with, or personal ingress upon property, as by making sale of it for "instance?" Mr. Hudleston says "I think this is a bad definition; "with reference to the illustration (*a*) I think walking into a building is "ill described as exercising dominion over it."

626 To exercise dominion over any property, is to do in respect of that property what can only be lawfully done by the *dominus*, or by authority derived mediately or immediately from him. This we presume is what was

meant by the expression as it is employed in Clause 418, and it seems to us that the illustrations are all just examples of the "exercise of domi-"nion" in this sense. But we must admit that these words go as far as Mr. Norton's question implies, and that to sell a house would be to exercise dominion over it, which is clearly beyond the intention.

627. It seems to us therefore that it will be better to abandon the term dominion in this place, and to modify the definition of trespass by specifying the sorts of acts which we understand to have been meant. We would propose that the definition should stand as follows:

Whoever enters or causes any animal or thing to enter upon or into any property, or who makes use of any property, not having a legal right independent of the consent of any other party, and not having the consent express or implied of any party legally entitled to give a consent, is said to "trespass."

628. "Trespass" is not an offence by the Code except when it is committed in order to the commission of some offence by which it is intended to injure, or in order to intimidate, insult, or annoy any possessor of the property on which the trespass is committed, or any person exercising any dominion over such property by permission of such possessor, which is designated in Clause 419 as "criminal trespass."

629. The aggravations of "criminal trespass" are "house tres-"pass," (Clause 420) "lurking house trespass," (Clause 421) "lurking "house trespass by night," (Clause 422) "house breaking," (Clause 423) "house breaking by night," (Clause 424.)

630. With respect to these aggravations the authors of the Code offer the following remarks:

"There is no sort of property which it is so desirable to guard "against unlawful intrusion, as the habitations in which men reside, and "the buildings in which they keep their goods. The offence of trespass-"ing on these places, we designate as house trespass, and we treat it as "an aggravated form of criminal trespass." Notes p. 85.

"House trespass again may be aggravated by being committed in a "surreptitious or a violent manner. The former aggravated form of "house trespass we designate as lurking house trespass, the latter we "designate as house breaking. Again, house trespass in every form "may be aggravated by the time at which it is committed. Trespass of "this sort has, for obvious reasons, always been considered as a more

"serious offence when committed by night than when committed by day. "Thus we have four aggravated forms of that sort of criminal trespass "which we designate as house trespass, house breaking, lurking house "trespass by night, and house breaking by night."

Clauses 426, 431, 435.

631. These forms of Criminal trespass "aggravated by the way "in which they are committed," are punishable as distinct substantive offences; they are punishable again with increased severity when they are committed in order to the commission of other offences, or are "aggravated by the end for which they are committed."

Clauses 427 to 430. 432 to 434 436 to 438

Supra, para 505

632. We have already noticed an objection taken under the head of "theft" to the separation of that offence from "house trespass" when the two actions appear to be parts of an integral crime, an arrangement which it is supposed will prove inconvenient in practice, from the references which will be necessary from one part of the Code to another. We have said that we do not think it likely that there will be any real inconvenience in the practical application of the law, owing to the arrangement in question, when the new way is once perfectly understood. In theory we are inclined to think the arrangement in the Code,* by which the trespass is treated as the primary and simple offence, and theft and other offences following upon the trespass as complications and aggravations superadded extrinsically, to be the more just and methodical. There is as much reason for treating "house trespass" as an aggravation of any other offence in order to which it is committed, as for treating it as an aggravation of theft; but if the principle were followed out generally, it is obvious that there would be a great deal of needless and unseemly repetition, and also, we apprehend, much practical inconvenience.

* The same arrangement obtains under the head of "hurt," "assault," &c.

633. We observe that the English Criminal Law Commissioners have expressed an opinion in favor of the same arrangement as that which has been adopted in the Code, intimating that it is the arrangement which, if their object had been to reconstruct the law instead of merely digesting it, they would have been disposed to follow. "The "proper course as it appears to us," they say, "would be to consider break-"ing a dwelling house as in all cases the simple offence; and then to "classify the circumstances of stealing or committing any other offence "therein, of night time, and of alarm or injury to inmates, as so many "aggravations, to each of which, when added to the crime of house break-"ing, an appropriate place in the scale of punishments should be assigned. "We apprehend that an arrangement of the law upon this principle, "would obviate many of the most embarrassing difficulties by which the "subject is at present attended"

5th Report, p 9.

634. For "house trespass," "lurking house trespass" and "house "breaking," and "lurking house trespass" and "house breaking by "night," in order to the committing of any other offence, which offence is actually committed, the offender is liable to both the punishment for "house trespass" (or as the case may be) and the punishment of the offence actually committed in addition. Clauses 427, 432, 436.

635. For "house trespass" in order to the committing of an offence punishable with death or transportation for life, but which offence is not committed, the offender is liable to transportation for life as the maximum punishment. Clause 428

636. There is no corresponding provision for "lurking house "trespass" or "house breaking" by day, or by night, with the same object.

637. When the object is the committing of an offence punishable with imprisonment, the maximum punishment is imprisonment not exceeding $\frac{1}{3}$, $\frac{1}{2}$, or $\frac{2}{3}$, of the longest term of imprisonment for such offence, in addition to one year, two years, or three years, as the primary offence may be "house trespass," "lurking house trespass," or "house "breaking," or lurking house trespass or "house breaking by night." Clauses 429, 433 and 437

638. We have remarked above in commenting upon Clause 367, that there is no provision under the head of "criminal trespass" similar to that contained in the said Clause, for cases in which the offender has made preparation for causing death to any person, and we have suggested that such a provision be inserted in Clauses 430, 434, and 438. The maximum punishment should be proportionately increased in each Clause. Para. 50

639. Clause 423 defines "house breaking" to be "house trespass" committed in any of six ways therein described. The essence of the offence of "house breaking" (which becomes "house breaking by night" when it is committed "after sunset and before sunrise") therefore consists in effecting an *entrance* into "any building, tent, or vessel, used as a "human dwelling, or any building used as a place for worship, or as a "place for the custody of property"—1st, by a passage *made* for the purpose; 2d, by a passage not intended for human entrance; 3d, by a passage *opened* for the purpose by means not intended to be used for opening it; 4th, by opening a lock with a key not found in it, or with a key left in the lock for the purpose; 5th, by committing assault, or shew, or threat of assault; 6th, by a passage known to have been fastened against such entrance, unfastened from within for the purpose.

Chapter XVII

5th Report p 10

640. These ways of entry all appear to be recognized in the defition of burglary in the Digest of the English Criminal Law Commissioners. In framing this definition the Commissioners have pursued the same course as was taken in the Code. "According to the common law definition," they observe, "an *actual breaking* as well as an entry "was essential to the offence, but the Courts had found it necessary to "construe breaking to include invasions of the dwelling house effected "by stratagem, or fraud, or by intimidation, as well as by actual force." To avoid giving occasion for such constructions, "instead of defining "the offence to be a *breaking* and entering, &c. we have," they say, "described it as consisting in an entry by any of the means which either "in popular language, or by construction of law, have been held to "amount to a breaking."

Chapter XVII Art 6

Page 11.

641. The definition in the Code appears to fall short of that in the Digest by not including an entry effected "by means of any stratagem, "trick, or device fraudulently practised for the purpose of obtaining "admission," of which instances are given in the Note to Article 6 under the head of Burglary in the 5th Report of the English Criminal Law Commissioners. It does however provide for entrance obtained by collusion "with other persons unlawfully affording or facilitating such "entry," which is provided for in the same article of the Digest.

642. It is explained in the Code in agreement with the Digest that the introduction of any part of the body is a sufficient entering to satisfy the definition, but there is no provision to correspond with that of Article 10 in the Digest, by which the introduction of any engine, or instrument, or the discharge of any missile into a dwelling house is to be deemed such entering.

643. The offence of burglary in the Digest can only be committed in a *dwelling house*, whereas "house breaking" by the Code can be committed wherever "house trespass" can be committed, that is in a tent, or vessel, as well as in a building, and in a building used as a place of worship, or for the custody of property, as well as for a "dwelling."

Para 509

644. In noticing above the suggestion of Mr. J. F. Thomas that in providing for offences against property a distinction ought to be made between mat and bamboo huts and such like fragile dwelling places incapable of being secured against intrusion, and substantial houses sufficiently protected from invasion, we observed that if any such distinction were required the proper place for it would be where provision is made for the offence of "house trespass," &c. Upon further consideration of

the subject on this occasion it appears to us that the provisions regarding that aggravation of the offence of "house trespass" which is designated as "house breaking," ought not to be applied to any buildings but such as are of a construction to admit of their being firmly secured against invasion, that is to say, buildings with substantial walls and roofs, and furnished with doors and windows having locks and bolts, or other means by which they can be effectually closed. Other buildings we would except from Clause 423. We would likewise except "tents" from the dwellings to which the provisions of Clause 423 are to be applicable. It does not appear to us to be necessary or expedient to make like exceptions from the other provisions touching "house trespass" and the aggravations thereof.

645. According to the definition given in the Digest of the English Criminal Law, a dwelling house must be a "*fixed and permanent building*." The Commissioners observe, in a Note on this definition in their 5th Report, that "Although the authorities do not supply "any precise description of the building which, if inhabited, may be the "subject of burglary, they exclude by instances and illustrations enclosed grounds and all erections of a merely moveable and temporary "nature, such as booths or tents." Chapter XVII Art. 13 p 12

646. The definition of burglary in the Digest includes expressly an entry made into some *inner part* of a dwelling house as well as an entry into a dwelling house, but taking the definitions of "house trespass" and "house breaking" in the Code together, it seems to us that only the first entry into the house by any of the ways indicated in Clause 423 is provided for. We are inclined to think that a person entering as a house trespasser (420), remaining as a lurking house trespasser until night (421 and 422), and then breaking or making an entrance into a closed and fastened inner chamber by any of the ways described in Clause, 423, ought to be regarded as a house breaker equally with the man that makes an entry into the house from without by any such way. This is immaterial, however, as the punishment is the same for "lurking house trespass" and for "house breaking." Clause 441.

647. Referring to Clause 440 which provides for the offence of fraudulently opening a closed receptacle by a person intrusted with the keeping of it by law or in pursuance of a contract, Mr. J. F. Thomas suggests that it would perhaps avoid difficulties if the words express or implied were inserted after the word "contract." These words, we observe, are introduced in the manner proposed, to qualify the term "contract"

in Clause 386 relating to criminal breach of trust, and it appears to us equally proper that they should be introduced in this place.

648. Some objections have been made by one or two Officers to the punishments for the more serious offences falling under the general head of criminal trespass, but it does not appear to us that they are of sufficient importance to call for any modification thereof.

CONCLUSION.

649. Recurring now, on the conclusion of our review of the Chapters which principally form the subject of this Report, to the statement made in the preliminary part of it, of what we conceive to be the practical questions regarding the Code upon which the Government desire to be advised, we think it proper to say, that it is our deliberate opinion with respect to the portion to which we have given our more particular attention in detail, that it is sufficiently complete, and, with such slight modifications as we have suggested, fit to be acted upon, and that if it be brought into operation it may be reasonably expected to work an important improvement in the administration of Criminal Justice. We think it might be brought into operation in the Company's Courts with little if any alteration of procedure with the help of a few plain and simple directions as to the manner of laying the charges, and some rules to define the offences falling to the jurisdiction of the several Courts, with reference to the punishments they are respectively authorized to inflict. It does not appear to us, as at present advised, that there would be any great difficulty in adapting the procedure of Her Majesty's Courts to the new system. Of the two Judges of Her Majesty's Courts who have expressed opinions on this point, one it will be seen has declared that he could act upon the Code immediately, while the other thinks it could not be acted upon without some change in the system of Criminal pleadings.

650. In submitting this our first Report on the Indian Penal Code, we have only further to state that, pending the orders of your Honor in Council, we shall proceed with the examination of the remaining Chapters of the work in the same manner as we have examined those upon which our observations are now submitted for the consideration of Government.

C. H. CAMERON,
D. ELIOTT.

INDIAN LAW COMMISSION,
The 23d July, 1846.

POSTSCRIPT.

651. After the foregoing Report was finished the 2d Report of Her Majesty's Commissioners for revising and consolidating the Criminal Law came into our hands, and finding that in some important points modifications of the existing law are proposed, in order to render the Penal Code of England "suitable to the present state of society, and conformable to the enlightened principles of jurisprudence," which if adopted will bring the law of England into a closer correspondence with that proposed in the Indian Penal Code, we deem it proper to add a brief notice of some of the proposed modifications affecting matters treated of in the Chapters of the Indian Code which we have reviewed.

652. First we have to point out that in the Chapter of Preliminary Declarations and Enactments in the Schedule prepared by the Commissioners, the first article of the section treating of incapacity to commit crimes, in agreement with Clause 66 of the Indian Penal Code, recognizes the state of Idiotcy distinctly, as excepting a person from criminal responsibility. The agreement on this head stops here, for while the Indian Code declares simply, in separate Clauses, that nothing is an offence which is done by a child under seven years of age, or by one above seven but under twelve years of age, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct, or by a person mad or delirious at the time of doing the thing, the Schedule has an article declaring generally that no person shall be criminally responsible for any act or omission who "by reason of unripeness or "weakness of mind, or of any unsoundness, disease or delusion of mind, "wants *the capacity*" "*of discerning that such act or omission is contrary* "*to the law of the land.*" This definition, which is quite new, is strongly objected to by one of the Commissioners, Mr. Starkie.

Chapter I

Sec. 1. Art. 1, p. 9.

64.

65

67.

Chapter I. Sec. 1. Art. 2. p 9.

653. We conceive that the Indian Law Commissioners meant to include "weakness of mind" under the general term "idiotcy." This word is not in Johnson's Dictionary, but the equivalent term "idiotism" is interpreted by him as signifying "natural imbecility of mind."

654. The simple enunciation in Clause 67 of the Indian Code that "nothing is an offence which a person does in consequence of being mad "or delirious at the time of doing it," is in accordance with Mr. Livingstone's Code and with the Code Penal of France on the same point. In

Article 35 of the former it is declared that "no act done by a person in "a state of insanity can be punished as an offence." The following is the declaration of the French law—"Iié n'y a ni crime ni dèlit lorsque "le prévenu était en état de démence au tems de l' action."

Art. 64.

Art. 3, p 11.

655. The next article in this section of the Schedule, providing that "no person shall be exempted from criminal responsibility by reason "of any temporary incapacity which he shall have wilfully incurred by "intoxication or other means," agrees substantially with Clause 68 of the Indian Code. We would refer here to the remarks we have made in para. 119 of the foregoing Report on the distinction between delirium in Clause 67, and the temporary incapacity of mind arising from intoxication by the use of narcotic drugs, &c.

p 12.

656. The article relating to Duress in the Schedule differs from that in the Digest cited in para. 104 of our Report, by the omission of the words "of grievous bodily harm," thereby limiting the excuse on this ground to cases in which the party acted under a present fear of death as proposed by us in para. 169.

See note to Art 9, p 12.

657. The Schedule agrees with the Code in excluding the excuse of marital coercion in the case of a woman charged with the commission of a criminal act, adverted to in paras. 173 and 174 of our Report.

Sec. 2, Art 2, p. 14.

658. In Article 2 of the 2d Section of the same Chapter of the Schedule there is an explanation of the term "unlawful," which will be found to agree with the explanation of the term "illegal" in Clause 28 of the Code, noticed by us in para. 91 of our Report in reference to an objection which had been made to the application of it "to every thing "which furnishes ground for a civil action." According to the above article "an omission shall be deemed to be unlawful whensoever it "gives cause for civil action." In explaining their reasons for rendering persons criminally liable for the consequences of omissions which they were bound by contract to have avoided, Her Majesty's Commissioners quote the remarks of the Indian Law Commissioners on the subject, in which they express a general concurrence.

659. The word "injury" is used in the Schedule as a general term, in the same way as it is used in the Code, and the definition of it agrees with that given in Clause 29 of the latter.

Sect. 2, Art. 6.

660. Article 6 of the same Section lays down that "an injury "shall be deemed to be accidentally caused whensoever it is neither

" wilfully nor negligently caused," and that "accidental injuries do not " subject the persons causing them to punishment," except as elsewhere mentioned in the Act.

661. The Commissioners explain that they intend here to depart from the principle of the present law, and following the principle advocated by the Indian Law Commissioners, whose arguments they quote at length, as having their general concurrence, to make it the general rule that "where a person does an unlawful act, and a consequence " follows which has no probable connexion with it, and can neither be " imputed to wilfulness or want of caution, the agent should be dispun- " ishable, except for the unlawful act in which he was engaged." We beg to refer to the observations on this head in our Report.

2d Report p 17 and 18

Paras 310 to 312

662. With reference to our observations in paras. 176 to 185, upon the provisions of the Code compared with the English law of Principal and Accessory, we have now to point out that in the Schedule under consideration Her Majesty's Commissioners propose to abolish the difference of punishment between principals in the first and second degree and accessories, and the technical distinction between principals in the first and second degrees, and to make the offence of being an accessory a substantive offence. By the change proposed the law of England will correspond with the Indian Code on these points.

Chapter I, Sect 3, Art 1 Note (a) p 19

663. In para. 327 of our Report it is remarked that there is no limitation of time in the Indian Code, corresponding with that of the English law in respect to the cognizance of homicide. This limitation of time "confining prosecutions for murder to cases where the party " injured dies within a year and a day after the cause of death," Her Majesty's Commissioners have not inserted in their Schedule.

Note (a) Art 1, Sect 1, Chap II, p 21

664. Referring to the observations in our Report (paras. 242 to 249) upon the definition of "voluntary culpable homicide" in the Code, as including cases in which death is caused by an influence on the mind, and the exception of such cases in the Digest contained in the seventh Report of the English Criminal Law Commissioners, we have to note that this exception is maintained in the Schedule under consideration, the Commissioners observing that they "do not feel justified in abandoning a " principle which has been sanctioned by long usage and high autho- " rities," though they "conceive that there is great weight in the " reasoning urged by the Indian Law Commissioners in support of their " adoption of a different course."

Chap II, Sec 1, Art 4. Note (d) p 22

Chap II., Sect. 2, Art. 2.

665. The Commissioners have given a new definition of "murder" agreeing in principle with that suggested by Mr. Livingstone, and to explain the advantages of it they submit the observations by which Mr. Livingstone recommended his definition to the Legislature of Louisiana. The definition is as follows : "Homicide is murder whensoever "the killing is wilful, and is neither extenuated within the provisions of "Section 3, nor justifiable within the provisions of Section 5 of this "Chapter." Under the explanation before given of the term "wilful," which agrees substantially with that quoted by us in para 103 from the Digest, the above definition corresponds very closely to that contained in Clauses 294 and 295 of the Code. "Extenuated homicide," it is to be observed, includes that which is termed "manslaughter" in the Code, and also that which is designated as "voluntary culpable homicide by "consent." Under the head of "justifiable homicide" are contained some provisions similar to those which in the Code find place in the Chapter of "exceptions."

Chap. I., Sect. 2, Art. 3.

Chap II Sect. 3, Art. 2.

Sect. 3, Art. 3.

Paras. 258 to 266.

666. With reference to our observations upon the question of treating a person who has caused the death of another by bearing false witness against him before a Court of Justice, as guilty of murder, and making him liable to capital punishment, as provided by the Code, we have to mention that the Commissioners have decided to except this offence from the definition of murder in their Schedule, though, they observe, "the "act seems to be attended with many of the bad consequences, and "to have the general features of a murder of the most malignant descrip-"tion," and though "there appear to be strong grounds for apprehending "that it is murder by the law of England, as it is by several other "Codes." They propose to provide for the crime in the Chapter relating to offences against the administration of justice, as we have advised in para. 266 in regard to the Indian Code. The terms of the definition of murder plainly embracing this offence, the Commissioners have thought it necessary to declare the exception expressly in a separate Article, and perhaps it will be proper to introduce an "explanation" after Clause 294 of the Code, to notify that this offence is to be dealt with under Clause 191 of the chapter of offences against public justice.

Chap. II, Sect. 2, Art 3.

Note (b) p. 5.

See Paras. 268 to 271.

667. In para. 269 of our Report we have remarked that under the English law the plea of provocation is not available to reduce homicide from murder to manslaughter when the provocation has arisen from mere words or gestures, but that there is no such restriction in the Indian Code. Her Majesty's Commissioners in their present report observe that the rules of the existing law of England on this point "appear to be un-"reasonable, when the principle is considered upon which extenuation

Page 25. Note (b) Art. 2 Sec. 3.

" is admissible, viz., the want of self-control occasioned by means which, " according to the constitution of human nature, ordinarily produce this " effect." They quote at length the remarks of the Indian Law Commissioners on the subject, which, they say, " seem to be very deserving " of attention." Their definition of " extenuated homicide" therefore is not restricted by any such exception as that which, following the existing law, their predecessors thought themselves obliged to introduce into their Digest. It does not however exactly agree with the Code on this point, in as much as the latter explains " grave provocation" to be " such " as would be likely to move a person of ordinary temper to violent " passion," whereas by the definition in the Schedule the gravity of the provocation is left to the judgment of the jury in each case. The Commissioners say, " It has been thought by some jurists that the criterion " in these cases ought to be, what would take away the self-control of a " person of ordinary temper. But we have thought it better to abide " by the present law, according to which the circumstances of the indi- " vidual accused are relevant to the question of extenuation."

Chap. II, Sec. 3, Art. 2, page 25.

Digest Chap XV., Sec. 12, Art 34. Explan. to Cl. 297.

668. As in the Code the explanation subjoined to Clause 297, declaring what is meant by " grave provocation" such as will reduce " voluntary " culpable homicide" to " manslaughter," has a proviso that such provocation was not given by any thing done in obedience to the law, or by any thing authorized by the law of civil or criminal procedure, or by any thing done by a public servant in the exercise of his lawful powers, so Her Majesty's Commissioners have introduced into their Schedule an article declaring that homicide is not extenuated on the plea of provocation where any Officer or other person lawfully executing any writ, &c., civil or criminal, or lawfully acting in obedience to the command of a magistrate, or otherwise lawfully acting under authority for the advancement of the law, is wilfully killed.

Chap II. Sect. 3, Art 6, page 27.

669. Again, they have an article declaring that homicide is not extenuated in such a case although the writ, &c., be not sufficient in law, or the command be unlawful, or the officer have no authority, or the manner of executing the writ, &c., be unlawful, provided the officer believed himself to be acting lawfully as aforesaid, and provided the party killing had notice that the Officer proposed to act under such writ, &c.

Art. 7, page 28.

670. As we understand the last article it appears to us that the effect of it, for the declared object of protecting officers of justice in the execution of their duty, will be much the same as that of the proviso to Clause 297 of the Code just adverted to, construed with reference to the declaration in Clause 75, that there is no right of private defence against

an act done by a public servant who is legally competent as such public servant to do that act, though that act may be an offence in that public servant, &c. The reasons which induced Her Majesty's Commissioners to frame the article in question as it stands in their Schedule are stated in pages 27 and 28 of their Report.

671. After stating those reasons the Commissioners add that they "also think that where an officer believing that he is executing legal process "commits homicide, such homicide should, notwithstanding the process "is erroneous in the frame of it, be *extenuated*." "In such case," they observe, "he will still remain liable to severe punishment." A provision to this effect is inserted accordingly in Article 8.

Page 28.

Report paras. 115 and 116.

672. By Clause 62 of the Indian Code, as we have interpreted it, an officer committing homicide in executing what he believes in good faith to be legal process, but which is not so, being led to the belief of its legality by a *misconception of facts*, would be wholly excused. The words of the Clause indeed, as we have observed, admit of a wider construction, and have been understood to *excuse* an officer acting under an erroneous impression of his duty arising from a misconception of the *law*, under such circumstances as would *extenuate* the offence under the article of the Schedule which we are now considering; as for example an officer acting for the advancement of the law, erroneously believing himself to have authority by law so to act, and in that belief and in prosecution of that object committing homicide. We have advised that qualifying words be introduced into Clause 62, to prevent the wide construction here adverted to, of which some have thought it susceptible.

673. Though we are not prepared to agree to such a latitude of indulgence to officers acting *bona fide* for the advancement of the law, as to *excuse* them entirely from penal responsibility for homicide committed, under such circumstances as are described in Article 8 of the Schedule, when they have erred from a misconception of the *law;* yet we think that such circumstances ought to be regarded as *extenuating* the homicide. Sometimes the incidents of the case may bring homicide so committed under the provision for "voluntary culpable homicide in defence" in Clause 299 of the Code. But this will not be generally applicable, and we are inclined to recommend the introduction of a new provision to correspond with the said article.

674. It appears to us to be advisable to add to Clause 75, and to the explanation annexed to Clause 297 of the Code, a proviso corresponding with that contained in the articles of the Schedule we have just been

considering, requiring it to be notified that the Officer is acting under a writ, or in obedience to command, or otherwise, for the advancement of the law.

675. We have observed that under the head of "extenuated homicide" in the Schedule is included what is designated in the Code as "voluntary culpable homicide by consent." In support of the provision which distinguishes such homicide from murder, the Commissioners cite the observations of the Indian Law Commissioners on the subject, which, they say, "appear to them to have great weight." Further, they distinctly provide for homicide in duelling as "extenuated homicide," and vindicate the provision upon grounds similar to those upon which we have advocated the dealing with this offence as "voluntary culpable homicide by consent" under Clause 298 of the Code, as we believe was intended by its authors. In the Schedule is a separate article declaring that homicide in duelling is not extenuated when the death of the person killed is caused by unfair means. We do not think such a proviso necessary in the Code, as the terms of Clause 298, we conceive, exclude any case of death caused by other means than those to which the person killed gave his "intelligent consent." The punishment for homicide in duelling by the Schedule is transportation for life or for any term not less than seven years; by the Code it is imprisonment of either description for a term not exceeding fourteen years, nor less than two years, to which may be added fine at discretion.

Art. 14, page 29

Art 16, page 30

Report para. 290.

Art. 17.

676. The Schedule provides specially for "negligent homicide," the definition of which in Article 2, Section 4, Chapter II, together with that in Article 5, Section 2, Chapter I, therein referred to, agrees essentially with Clause 304 of the Code. The punishment is imprisonment not exceeding three years by the former, not exceeding two years by the latter.

677. The Schedule in many cases treats as "justifiable homicide" what under the Chapter of Exceptions in the Code is held to be no offence, as when the homicide is committed by a person acting lawfully under a lawful authority, in various ways, for the advancement of the law, and giving notice of the authority under which he acts. We think it advisable to add the proviso regarding notice to Clauses 62 and 63 of the Code, as well as to Clause 75, and to the explanation annexed to Clause 297, as above recommended. Particulars, it is to be observed, are given in the articles of the Schedules here referred to, which the framers of the Code left to be specified under the head of procedure, to which they appear more properly to belong. Her Majesty's

Chapter II. Sec 5.

Compare Art 1 to 11 with Clauses 62 and 63 of the Code.

2d Report, page 7 Commissioners, it appears, contemplate a revision of their work when the whole Digest is completed, with a view to generalization and the systematical adjustment of the several portions, and probably there will then be a more distinct separation of the provisions which belong to procedure.

Chap. II Sect. 5, Art 12 to 18. 678. Again, homicide is treated as "justifiable" in the Schedule when it is committed in the lawful defence of person or property, the provisions not materially differing from those under the head of the "right "of private defence," in the Chapter of Exceptions in the Code, which are however much more full and explicit.

Cl. 74 to 84.

Art 19. 679. The last article in the Schedule under the head of "justifiable "homicide," appears to correspond with Clauses 70 and 72 of the Code, except that the consent of the sufferer is not required by the former as it is by Clause 70, when the party is able to signify consent.

Page 36 680. Her Majesty's Commissioners agreeing to the sentiments expressed by the Indian Law Commissioners in Note B. quoted in para. 166 of our Report, have resolved to omit any provision "justificatory of the "homicide of an offending party committed in order to save the life of "the accused, or rather because the accused reasonably thought that the "homicide was indispensable for preserving his own life."

Vide paras. 165 to 168.

Chap II, Sect. 6, Art 2, page 37. 681. The offence of aiding in, or abetting the commission of self-murder, which by the present law of England is murder, the Commissioners propose to make punishable with transportation for life, or for not less than seven years, which is the punishment they provide for homicide by consent. By Clause 307 of the Code also, this offence is punishable with the penalty therein provided for homicide by consent, viz., imprisonment for fourteen years, or not less than two years, except (Clause 306) the person who commits suicide is a child, or of unsound mind, &c., when the punishment may be death, or transportation, or imprisonment for life.

682. The Schedule provides that attempts to commit murder by
Chap. II, Sect. 7, Art. 1 poisoning, or by any means causing bodily harm, or by setting fire to, or
3. casting away a ship, &c., shall be punishable capitally, (the Commissioners however expressing a wish to reconsider their recommendation on this point when they present a general chapter on the subject of punishments) and that attempts to commit murder otherwise than by
2 poisoning, although no bodily harm shall be caused, shall be punished with transportation for life, or for any term not less than 7 years, or with
4 imprisonment not exceeding three years. Again, the maliciously putting

the life of any person in danger, by any means not before specified, is punishable with imprisonment not exceeding three years, or fine, or both.

683. Attempts to commit murder are by the Code liable to be punished with transportation for life; attempts to commit homicide which under the circumstances would be culpable homicide less than murder, with imprisonment which may extend to three years. Clause 308. 309.

684. The term "grievous bodily harm" is used in the Schedule to designate "all the serious personal injuries, short of death, the commission "of which and the attempting to commit which should be visited with "severer punishment than other personal injuries." Upon the definition of this term the Commissioners say "they have endeavored to include "within its meaning the more serious kinds of personal injury, without "reference to pugnacity or other principle than the damage and "suffering occasioned." They appear to have aimed at giving in a condensed form the substance of the detailed definition of the kinds of "hurt" designated as "grievous" in the Indian Code, which, with the remarks of the Indian Law Commissioners, they cite at length in their note. "The limitation of twenty days," in their definition, they observe, "is taken from the French Code, and was adopted from that Code by the "Indian Law Commissioners." Upon this subject we would refer to the observations in our Report, and particularly to the observations in para. 374 on the point last mentioned. We observe that Mr. Starkie objects, as we do, to the limitation of twenty days in the definition of "grievous bodily harm" or "grievous hurt." Chap. II Sec 7, Art. 6. Page 39 Note (e) Chap III. Art. 1. Clause 314. Report Paras 356 to 386.

685. The punishment proposed for "grievous bodily harm" in the Schedule is transportation for life, or for a term not less than seven years, or imprisonment not exceeding three years, nor less than one year. By the Code the maximum punishment for "grievous hurt" simply is imprisonment for ten years, to which fine may be added; the minimum is imprisonment for six months. Attempts to cause "grievous bodily "harm" are punishable by the Schedule in the same manner as the completed offence, except that there is no minimum limit to the imprisonment. The punishment for an attempt, by the Code, is half of that which may be inflicted for the completed offence. Clause 319. Chap. II. Sec. 7, Art 7. Clause 329.

686. A subsequent article of the Schedule in the same section, but separated from that relating to "grievous bodily harm," provides for other "bodily harm" (answering to simple "hurt" in the Code) or "violence," caused or done "maliciously or negligently." The punishment is the same as is prescribed by the Code for "hurt"—imprisonment Chap II. Sec. 7, Art. 38, page 43.

not exceeding one year, or fine, or both, except that in the Code the fine is limited to Rupées 1,000.

Art 40, page 45

687. Article 40 of the same Section contains a provision corresponding to that of Clause 70 of the Code, justifying any harm arising from any thing not intended to cause death, which was done with the consent of the party suffering.

Art. 43, p 45
Para. 398
Clause 341

688. The definition of assault in the Schedule differs from that contained in the Digest and quoted in our Report, by the addition of the words "or menace by gestures," by which it is made to comprehend what in the Code is designated as "shew of assault."

Chap II Sec 7, Art 15

689. The Statute Law* of England, which we apprehend is the only law upon this subject which is enforced, differs from the Indian Code on the subject of abortion, in that the former does not punish the woman who voluntarily causes herself to miscarry, whereas by the latter she is punishable. We find that it is now proposed that "every woman being "with child, who with intent to procure her own miscarriage, shall "maliciously administer to herself any poison or other noxious thing, or "use any instrument or other means whatsoever," shall be liable to transportation for life, or for any term not less than seven years, or imprisonment for a term not exceeding three years.

Clause 312
Clause 313

690. The punishment proposed in the Code is imprisonment not exceeding three years, or fine, or both. By the Schedule of Her Majesty's Commissioners, and also by the Indian Code, a person causing, or using means to cause the miscarriage of a woman is liable to the same punishment as is prescribed for a woman causing her own miscarriage; By the Code a person causing a woman to miscarry without her consent is liable to additional punishment for any hurt that may ensue.

691. The above article in the Schedule is followed by a proviso that the Act intended to procure miscarriage was not done in good faith with the view of saving the life of the woman, which corresponds with the terms of Clause 312 of the Code.

Digest in 7th Report Chap XV Sec 15, Art 20

692. The article defining "rape" in the Schedule contains, in addition to the words used in the definition given in the Digest, the words following, "or whilst she is insensible," which correspond with the second description of "rape" in Clause 359 of the Code.

* Note --By the old Common Law it seems that "if a woman be quick with child and by a potion or otherwise killeth it in her womb it is a great misprision" We ought to have noticed this at para 347 of our Report

693. The Code includes under "rape" sexual intercourse with a girl with or without her consent when she is under nine years of age. By the present law of England this offence is punishable as rape when the girl is under ten years of age. By the Schedule it is proposed to be so punishable when the girl is under twelve. By the Statute for India the age is eight years. Report para. 446.

694. The punishment for rape by the present law of England is transportation for life absolutely. In the Schedule it is altered to transportation for life, or for not less than seven years. By the Statute for India it is death. By the Code the maximum punishment is imprisonment for fourteen years. Ibid para. 447.

695. In the Schedule there is a new provision for the offence of administering drugs, &c., to a woman to render her insensible, or otherwise to affect her so as to facilitate the object of obtaining carnal knowledge of her. There is no similar provision in the Code, but it seems to be worthy of consideration whether this offence, which we apprehend is not uncommon in India, should not be included in it. The proposed punishment is imprisonment not exceeding two years. Chap II. Sec. 7, Art 24, page 43.

696. By Clause 296 of the Code it is provided that when a person intending to cause death kills a person whom he did not intend to kill, he shall be held guilty of the same degree of homicide as if he had caused the death which he intended. There are similar provisions in the Digest of the English law prepared by the late Commissioners. In the Schedule under consideration instead of those provisions limited to homicide, there are general provisions making a party liable to punishment for any injury caused by him to a person not intended to be injured, by means by which he intended to injure some person, in the same manner as if the person injured had been intended to be injured. In explanation the Commissioners say—"If these rules be applicable to homicide they "seem equally to apply to other severe personal injuries; as for example, "if A were attempting to put out B's eye, and by accident C intervened, "whose eye was put out by the thrust intended for B." Chap. XV Sec 2, Art. and 5. Chap II Sec. 7, Art. 45 and 46, page 46

697. We have lastly to remark that the present Commissioners have abandoned the classification of crimes as "treasons," "felonies," and "misdemeanors" according to the Digest of their predecessors, in which a new signification was given to the two latter terms; the term "felonies" being used to denote crimes punishable with death or transportation, also the crime of self-murder, and the term "misdemeanor" all other crimes except "treasons." The present Commissioners

Chap IV Of Penalties—Transportation for seven years, or imprisonment not exceeding three years.

have avoided the use of these terms altogether in the Schedule. In the 7th Section of the Draft of the Act to which the Schedule is proposed to be annexed, it is prescribed that offences liable to the penalties of the 6th or any higher class shall be tried in the same manner and under the same procedure as if such offences were by the said Schedule declared to be felonies; and offences liable to lower penalties as misdemeanors.

C. H. CAMERON.
D ELIOTT

INDIAN LAW COMMISSION,
The 5th November, 1846

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SECOND REPORT

ON THE

INDIAN PENAL CODE.

CALCUTTA

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1847

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FROM THE INDIAN LAW COMMISSIONERS,

TO THE HONORABLE

THE PRESIDENT OF THE COUNCIL OF INDIA,
IN COUNCIL.

1. We have the honor to submit our second and concluding Report on the Indian Penal Code.

2. Our first Report consisted of a review of the Chapters of a general nature governing the whole Code, namely, the Chapter of "General Explanations," the Chapter of "General Exceptions," and the Chapter of "Abetment," and of the important Chapters treating of "Offences affecting the human body," and of "Offences against property;" to which was added a brief notice of some modifications of the English Criminal Law, affecting matters treated of in those Chapters, which are proposed in the Second Report of Her Majesty's Commissioners for the revision and consolidation of that Law.

Report dated 23rd July 1846.

Chaps. I. III. IV.

Chaps. XVIII. XIX.

Postscript dated 5th Nov 1846

Submitted to Her Majesty, 14th May 1846

3. In this Report we begin with the Chapter of "Offences against the State," and proceed through all the Chapters of offences not before examined, in the order in which they stand in the Code, and finish with the Chapter of "Punishments," which stands second in the Code, but which we have purposely reserved to the last.

Chap V

Chaps VI to XVII and XX to XXVI

Chap II

CHAPTER V.

OF OFFENCES AGAINST THE STATE.

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4. This Chapter provides only for offences against the Government of India, and not for offences against the General Government of the British Empire, for reasons, stated in the note to the Chapter, which appear to us to be good and sufficient. Note C. page 26.

5. It may be well on this occasion to advert to the suggestion offered in that Note, as to the expediency of the interposition of the Imperial Legislature to pass a Law of High Treason for the Territories of the East India Company, on the ground that though "it is highly "improbable that any English King will visit his Indian dominions, or "that any plot having for its object the death of an English King will "ever extend its ramifications to India, it is by no means improbable "that persons residing in the territories of the East India Company "may be parties to the levying of war against the British Crown, with-"out violating any local regulation. If any insurrection were to take "place in any of the British dominions in the Eastern Seas, in Ceylon, "for example, or in Mauritius, it is by no means improbable that per-"sons residing within the Company's territories might furnish informa-"tion and stores to the rebels. And if this were done by a person not "subject to the jurisdiction of the Courts established by Royal Charter, "we are satisfied that there would be most serious difficulty in bringing "the criminal to legal punishment." p. 28.

6. The principal offence provided for in this Chapter is waging, or attempting to wage war against the Government, or abetting the waging of such war ; after which is the offence of concealing a design to wage such war ; next is the assaulting, or wrongfully restraining, or overawing by means of a riotous assembly, the Governor General, or any Governor or Deputy Governor, or Member of the Council of any Presidency, in order to induce or compel him to exercise, or refrain from exercising, any of his lawful powers. Clause 109. Clause 110. Clause 111.

7. Mr. Norton thinks that "the Law of High Treason as expressed in the Statutes of England in respect of levying War, &c., would with a little concentration of their language, have more clearly defined the offences intended to be created by these Clauses."

Digest in 7th Report of Criminal Law Commissioners Chap II. Sec I.

8. If the plain and simple terms of the Clauses in question be compared with the Articles of the Digest of the English Law on the same topics, we rather apprehend that the general opinion will be contrary to that of Mr. Norton.

Art. 11 to 13.

9. The English Criminal Law Commissioners, it will be observed, have given definitions of the terms "levying war," both as regards the manner of it, and as regards the objects intended thereby, which they deemed necessary in order to put a stop to a latitude of construction beyond what in their opinion the Statute of Treasons contemplated, but which has been sanctioned by high judicial authority. "The crime," they say, "is in plain and unambiguous terms declared by the Statute to consist in a levying of war. There is nothing to indicate that these terms were intended to be used otherwise than according to their literal sense, and indeed the context, as well as the history of the times antecedent to the declaratory Act, confirm the position that they were meant to be used in that sense." After much reasoning on the subject they say in conclusion, "under these impressions we are inclined to recommend that the use of all constructive interpretations of the Statute of Treasons, both in the article of levying war and of compassing the King's death, should be abolished by the Legislature; and we have accordingly inserted in the Digest provisions which will have the effect of excluding them."

25 Ed III. Stat 5,

6th Report, page 13

p 17.

p 6.

10. In another place the Commissioners say, "the terms of the Statute seem naturally to import a levying of war by one who throwing off the duty of allegiance arrays himself in open defiance of his Sovereign in like manner and by the like means as a foreign enemy would do, having gained footing within the realm." So also we conceive the terms "waging war against the Government" naturally import a person arraying himself in defiance of the Government in like manner and by like means as a foreign enemy would do; and it seems to us, as we presume it did to the authors of the Code, that any definition of terms so unambiguous, would be superfluous.

page 28

11. The reasons assigned in the Note for making the abetment of hostilities against the Government an offence specially, instead of leaving it to the operation of the General Law of Abetment in Chapter IV, appear

to us satisfactory. But we do not see that but for such a provision " a " conspiracy for the subversion of the Government which should be carri- " ed as far as the gunpowder treason, would be punishable very much " less severely than the counterfeiting of a rupee." It appears to us that under Clause 96 such a conspiracy carried so far, acts being done in pursuance thereof and in order to the committing of the offence contemplated, would be punishable with imprisonment for 6 years. It is true however that under the General Law of Abetment "a conspiracy for the " subversion of the Government would not be punished at all, if the " conspirators were detected before they had done more than discuss " plans, adopt resolutions, and interchange promises of fidelity." page 29.

12. Mr. Hudleston suggests that " the condition of owing allegi- " ance to the British Government ought to be added" to the definition in Clause 109. Mr. R. N. C. Hamilton says " ought not words fixing " some definitive individuality to be used," as " whoever *being a British* " *Subject* (or Subject of British India) wages war, &c. shall be punished " with death ?" " The rulers of foreign independent states (he observes) " any more than those of France or Russia, cannot be declared liable to " death for waging war. Yet the Clause as it stands comprehends " them."

13. The Statute of Treasons recited in the Digest is not more specific than this Chapter of the Code in regard to the persons subject to its provisions. It says simply " if *a man* do levy war against our Lord " the King in his realm," as the Code says, " *whoever* wages war against the Government," &c. The Laws of a particular nation or country cannot be applied to any persons but such as owe allegiance to the Government of the country, which allegiance is either perpetual, as in the case of a subject by birth or naturalization, &c., or temporary as in the case of a foreigner residing in the country. They are applicable of course to all such as thus owe allegiance to the Government, whether as subjects or foreigners, excepting as excepted by reservations or limitations which are parts of the laws in question. The specification proposed by Mr. Hamilton would exclude foreigners resident in the country. Now when foreigners enter a country it is supposed that they are allowed to do so only upon this tacit condition that they be subject to the laws. " The " public safety, the rights of the nation and the prince," says Vattel, " necessarily require this condition, and the foreigner tacitly submits to " it, as soon as he enters the country ; as he cannot presume that he has " access upon any other footing. The sovereignty is the right to com- " mand in the whole country, and the laws are not simply confined to re- " gulating the conduct of the citizens towards each other, but also deter- Book II. Ch. VIII..S 101.

"mine what is to be observed by all orders of people throughout the
S 102. "whole extent of the State." "In virtue of this submission, foreigners "who commit faults, are to be punished according to the laws of the "country." So the Statute 3 and 4 William IV. Cap. 85, empowers the Government of India to make Laws and Regulations for all persons whether British or Native, *foreigners* or others, *within* and *throughout the whole and every part of the Territories under the Government of the East India Company;* and if this Code should become the Law it would of course be understood as applicable to all persons thus subject to the Legislative Authority of the Governor General of India in Council, unless it were otherwise specially provided in the Act by which it was promulgated. Farther as the Legislative Authority of the Governor General in Council is expressly declared to extend to "all *servants of the said Company* "*within the dominions of Princes and States in alliance with the said* "*Company*," the Code would embrace them likewise.

14. The Authors of the Code considered it very desirable that it should be made to extend also to British born subjects of the Queen and to Native subjects of the British Government within the dominions of such Princes and States, but in their letter to the Governor General in Council, under date the 2d May 1837, they said they had serious doubts whether the Legislative Authority of the Government of India went so far. Upon this point and also upon the power of the Government of India to apply the Code to offences committed on the high seas by Natives of the British Territories, they recommended that a reference should be made
Dated 5th June 1837. to the Home Authorities. In the answer of the Secretary to the Government of India it was notified that a reference would be made to the Court of Directors in order that the doubts which had been suggested might be cleared up. A reference was made accordingly to the Court of Directors who took the opinion of the Attorney and Solicitor General, and of their own Counsel on the subject, which they communicated to the Government of India in a despatch, dated 19th February 1839. The Law Officers say that in their opinion "The Legislative Council has "power to pass Laws enacting and declaring that crimes and offences "committed in the Territories of Princes or States in India adjacent to "the British Territories, by persons, the *Native* subjects of and owing "obedience to the Laws of such British Territories shall be liable to be "tried and punished as if committed within the local limits of the British "Territories;" and also "that the Legislative Council has power in the "same manner to provide for the trial and punishment of crimes and "offences committed upon the high seas, enacting and declaring them "to be offences of the same quality and triable and punishable as if they "had been committed on land, as has been done, as to offences commit-

"ted at Sea, by British Statutes." They add that "it would of course "be proper to limit the application of such a Law to persons Natives and "subjects owing obedience to the Laws of the British Territories. For "Piracy, &c., provision has been made by existing Laws." It is to be observed that this opinion does not touch the question of the power of the Indian Legislature to make Laws binding on *British born* subjects of the Queen residing in the dominions of Princes and States in alliance with the East India Company, which appears to be still doubtful. 39 Geo. III., c. 37.

15. In the communication from the Secretary to the Government of India above referred to, it was also intimated that the Governor General in Council fully concurred in the principle advocated by the Commissioners in the letter above mentioned, "that the Penal Law should "extend to all inhabitants of India without distinction of rank, though "from Treaty, and more perhaps in form of procedure than in actual "liability, exceptions would no doubt be found more necessary in this "than in any other country."

16. If the Penal Code shall be adopted, it may be presumed that the Act by which it is promulgated will declare to what places and to what classes of persons it shall apply generally, and will notify any reservations or limitations which may be resolved upon.

17. Mr. Hudleston referring to a suggestion of Mr. Blanc, that the provision contained in Clause 111 should be extended to all constituted authorities, observes for himself that the Clause as it stands "appears to "be a strange provision with an inadequate penalty." It would be strange, we conceive, to magnify an assault of the nature described in this Clause, committed upon an inferior officer of the Government, as a "constituted authority," into an offence against the State; and equally strange *not* to make it an offence against the State when it is committed upon the Governor General of India, or a Governor, or a Member of the Government of any Presidency, with the view to deter him from exercising any of his lawful powers as Governor General, &c. It appears to us that Clauses 184 and 185 sufficiently provide for the punishment of attempts to overawe other public officers or "constituted authorities," when such attempts are not made by a "riotous assembly;" when they are made by a "riotous assembly," the provisions of Clause 127 and the following Clauses of the Chapter of Offences against the public tranquillity apply.

18. With reference apparently to Clause 113 and the explanation subjoined to it, Mr. Norton makes the following remarks:

"As regards the object of defining the *mode* of slandering Govern-
" ment—'as by words either spoken or intended to be read, or *signs*, &c.'
" and of defining what shall *constitute* slandering, namely, 'the exciting
" '*feelings* of *disaffection*,' as contrasted with the exciting only feelings
" of such a '*disapprobation* of measures of Government as is *compatible*
" 'with a *disposition* to render obedience *and* to support its *lawful*
" 'authority against unlawful attempts, &c.' I conceive the composers
" of this Code are as unfortunate as all others have been in that effort.
" Words *spoken* and *signs* made, and words *written*, with a view to sedi-
" tion or of exciting disaffection, are of very different effect and crimi-
" nality, and the vagueness in the definition of slander, is such, that no
" two persons would probably agree in their sense of it But the greatest
" objection appears to me to be the enormous severity with which the
" most trivial slander against Government, by the most trivial sign of
" communication, *may* be visited—extending as it may to banishment
" for life added to unlimited fine."

19. Mr. Cochrane in commenting upon Clause 113 says, "I think
" that as a mere matter of public policy, every Government should avoid
" punishing mere words, unless such be accompanied by acts injurious
" to the interests of the State. But this Clause does not only apply
" to words, but is in fact a direct attack on the public press. The ex-
" pression 'as is compatible with a disposition to render obedience,'
" which is the qualification of the Clause, appears to me of a very dan-
" gerous tendency, and calculated to place men's rights and liberties in
" the discretion of each particular Judge." He objects to the Clause also on the ground of the injustice of inflicting such severe punishments as are authorized by it.

20. Mr. Hudleston considers the Clause to be "wholly indefensi-
" ble," but he does not state his reasons for this opinion.

21. The offence which the Clause is intended to punish is that of attempting to excite feelings of *disaffection* to the Government; and to guard against too wide a construction of this term, and to give free scope to that kind of temperate discussion and criticism of public measures which is conducive to the public good, an explanation is subjoined declaring that by disaffection is not meant "such a disapprobation of
" the measures of Government as is compatible with a disposition to
" render obedience to the lawful authority of Government against unlaw-
" ful attempts to subvert or resist that authority." It seems to us that by this explanation the discretion of the Judge is pretty well guided and limited, and that there is by no means so much danger of his transgressing the just line as Mr. Cochrane apprehends.

22. As to the ways in which the attempt to excite disaffection may be made "by words either spoken, or intended to be read or by "signs, or by visible representations," the terms expressing them are the same as are used in the definition of defamation, and we presume that the same reasons which determined the authors of the Code not to make a distinction between written and spoken defamation, determined them likewise not to make a distinction between seditious words spoken in order to excite disaffection in the hearers, and seditious words written and intended to be read, the object being the same. These reasons are ably stated in the note to the Chapter on "Defamation." As to sedition, there can be little question, we conceive, that the object of exciting feelings of disaffection to the Government may be effected more easily, more suddenly, and therefore more dangerously, by an inflammatory declamation on a popular topic, addressed to a multitude by a skilful orator, than by the circulation of written or printed papers. Mere vague words spoken at random ought not indeed to be brought within this Clause; but as in the Digest of the English Criminal Law Commissioners it is laid down that words spoken shall not be deemed to constitute an overt act of any treason, *unless they be words of advice, direction, or persuasion*, tending to effectuate some traitorous act or design, so here must be understood significant words of advice, direction, or persuasion, tending to excite the people to whom they are addressed to a degree of disaffection incompatible with a disposition to render obedience to the lawful authority of the Government, &c., and spoken under circumstances indicating a design to cause such excitement, or under circumstances from which the speaker must have known it to be likely that the words spoken by him would cause such excitement.

Chapter XXV Note R.

Digest in 7th Report, Art. 18, S 1, Ch. II.

23. It seems that by the Common Law of England, "generally "speaking, any words, &c., tending to vility or disgrace the King, or to "lessen him in the esteem of his subjects" "even in common and unad-"vised discourse," "amount to a misprision punishable by fine and cor-"poral punishment," as well as by imprisonment, and by special Statutes persons advisedly speaking against the constitution on certain points, are liable to punishment by forfeiture of lands and goods, and imprisonment "at the King's pleasure, or as other authorities have it during life," which the Criminal Law Commissioners propose to change into imprisonment for a term not exceeding 3 years, (the maximum term of imprisonment specified in the Clause under consideration as the alternative for banishment,) and fine at discretion.

Russell I, p 221

Blackstone 4, p 123.

Articles 11 and 12 Sec 3, Chap II. of Digest.

24. By Article 5, Section 3, Chapter II. of the Digest of the English Criminal Law Commissioners "public speaking" is specified together

7th Report.

with "the exhibiting of flags, inscriptions," &c., as means of "exciting "in the minds of the subjects of the realm hatred or contempt of the "person of Her Majesty, or of her Government, or of the Constitution of "the United Kingdom," &c. The "exhibiting of flags" is a mode of using "signs or visible representations" within the scope of the definition in Clause 113.

25. With regard to Mr. Cochrane's objection that the provisions of this Clause, (touching "words intended to be read," we presume,) are an attack upon the public press, we have only to observe that the objection appears to apply equally to the Law of England by which the "composing, printing, or publishing" a seditious libel tending to bring into contempt the person of Her Majesty, or her Government, &c., is a penal offence. "Publications tending to degrade and vilify the constitution, "to promote insurrection, and circulate discontent through its members, "would," says Russell, "without doubt be considered as seditious and "criminal." Such publications only, under the explanation subjoined to Clause 113, would we conceive be liable to punishment by the provisions thereof.

Vol 1, p 220

Note to Art 46, p 33 6th Report of Commissioners on Criminal Law

Blackstone 4, p 122-3,

26. In England in cases of this nature the first offence it appears is punishable at Common Law. For a second offence the punishment is, by Statute, the same as in cases of high misdemeanors, that is, we apprehend, by fine and imprisonment at the discretion of the Court. Formerly the offender might be sentenced to *banishment* for such term of years as the Court should award, but this part of the law has been repealed. The punishment proposed by the English Criminal Law Commissioners in their Digest, is imprisonment for a term not exceeding 3 years.

Chap II, Sec 3, Art 4.

Vide post

27. Upon the propriety of the punishment of banishment for the offence in question, we shall be better prepared to deliver a positive opinion when we have maturely considered the Chapter of Punishments, which we reserve for examination ultimately.

28. We have only further to notice in this Chapter Clause 115, which provides for the punishment of persons "using any place within "the Territories of the East India Company for the purpose of making "preparations to commit depredations on the territories of any power at "peace with the Government of the said territories, *or for the purpose of taking refuge after committing such depredations.*"

29. Objection is made by several of the Officers whose reports we have had under consideration to the latter part of this Clause which proposes to punish persons taking refuge in the Company's territories.

This may include subjects who have gone out to commit depredations on other territories, and have returned for refuge, and persons, not subjects, who have come in for the purpose of taking refuge, after having committed depredations on another territory. It appears to us that all that it is proper for the Government to do when the refugees are not subjects is to refuse protection to them. The Magistrates might be empowered, on the application of the proper Officers of the State on whose territories the alleged depredations were made, to enquire into the cases, and if the charges shall appear to them to be well founded to deliver the accused to be tried and punished by the laws of the country in which they committed the offences complained of. With respect to subjects it appears to us proper to make them liable to punishment in the manner proposed. Colonel Sleeman approves of both parts of this Clause, in substance, but suggests the following alteration in the form of expression—" Whoever taking advantage of his position within the East India " Company's territories shall commit depredations within those of any " power at peace with the Government of the said territories ; or shall " take refuge within those territories after having committed such de- " predations shall, &c. &c." He says, " This is a very important enact- " ment, and will supply the place of Regulations V. of 1809, I of 1822, " and VIII of 1829. The Native Chiefs should be required to observe the " same rule in their relations with each other, that we here observe in " our relations with them all; and when we make them do so our su- " premacy will be really a blessing. In nothing have we so much neg- " lected our duty as in the licence we have virtually given them to " prey upon each other—or to allow their subjects to prey upon the " subjects of others."

30. Before we conclude our remarks upon this Chapter we wish to advert again to the suggestion made by the framers of the Code as to the expediency of the interposition of the Imperial Legislature to pass a Law of High Treason for the territories of the East India Company. We conceive that offences of a treasonable nature committed against the Government of India, must in contemplation of law be considered as offences against the Crown. And we have consequently very grave doubts whether the Council of India is not excluded from all legislative power on the subject, by that part of the 43d Section of the Charter Act which provides that they shall not " in any way repeal, vary, suspend " or affect" " any part of the unwritten laws or constitution of the United " Kingdom of Great Britain and Ireland, whereon may depend in any " degree, the allegiance of any person to the Crown of the United King- " dom, or the sovereignty or dominion of the said Crown over any part " of the said territories."

CHAPTER VI.

OF OFFENCES RELATING TO THE ARMY AND NAVY.

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31. The provisions of this Chapter are intended for the punishment of persons who, not being themselves subject to Military law, exhort or assist those who are subject to Military law, that is to say, Soldiers or Sailors in the Army or Navy of the Queen, or of the East India Company, to commit Military offences.

Note D

32. The note to the Chapter explains the necessity of having provisions of this nature, because the general law respecting the abetting of offences will not reach persons abetting Military delinquencies, such delinquencies not being punishable by this Code. It is also shewn that from the severity of Military penal law, justified by the circumstances of those for whom it is intended, the principle of the general law of abetment which punishes the abettor with a penalty equal or proportionate to that to which the person who commits the offence is liable, could not with propriety be followed in cases of this kind. The design is to provide for the punishment of offences of this sort, in a manner more consistent with the general character of the Code.

33. Mr. Cochrane objects to the punishments for abetting mutiny and assaults upon Officers as extremely severe. They are not however more severe than the punishments for the same offences by the English law.

34. Mr. Cochrane further objects to there being no distinction between assaults upon Officers in execution of duty, and assaults upon them off duty; upon which we have only to observe, that the Code in this respect agrees with Article 6 of the new Articles of War contained in Act XX. of 1845.

35. Mr. Hudleston observes that a distinction is made between mutiny and assaulting a superior, for which he does not see the ground. He might have discovered that the Code here follows the Articles of War for both the Queen's and Company's Forces.

36. It is asked are common soldiers and sailors only intended, and if so is it sufficiently clear? It appears that in the Articles of War for the Land and Sea forces of Her Majesty and the Company, respectively, the terms officers and soldiers, and officers and seamen, are used in contradistinction, and we presume that when the terms soldiers and sailors or seamen are used by themselves, as well as when, as in Clauses 118 and 119 of this Chapter, a superior officer is referred to, they are meant to signify common soldiers and sailors. In the Digest of the English Criminal law, in the Section of Offences relating to the Army and Navy, the expression is "Any *person* serving in Her Majesty's forces by sea or "land," which we conceive includes officers as well as common soldiers and sailors.

Chap II, S 6, Art. 1.

37. We have supposed that by the terms "soldiers and sailors," are meant persons in the Army and Navy, considering the latter term to signify exclusively ships of War, but this term is not used in the text, and we doubt whether the expression "sailor in the service of the Queen or of the East India Company," by itself, can be held to denote only a sailor employed in a ship of War and subject accordingly to Military law; for the East India Company have ships which do not belong to the Indian Navy and are not ships of War, and we imagine that not all the vessels employed as Packets, Revenue Cruisers, &c. in H. M. Service, are deemed to be ships of War, and navigated under the laws applicable thereto. It may be better to substitute for the words "in the service," the specific words "in the Army or Navy" of the Queen or of the East India Company, which are mentioned in the title of the Chapter, or to enlarge the expression as follows—"Any person employed in the Army "or Navy of the Queen or the East India Company, and subject to the "Laws and Articles of War for the Government of the Military or Naval "Forces of Her Majesty or the East India Company,"—if it should be thought proper to include officers as well as common soldiers and sailors.

38. We have to remark that in the "Exception" to Clause 124 the word "husband" has been inserted, apparently through inadvertence, by transcribing *verbatim* the "Exception" to Clause 107, which otherwise is appropriate, and which was evidently intended to be adopted in this place *mutatis mutandis*. If the exception to Clause 107 be altered as we have suggested in our former Report, this exception will need to be altered in the same manner, as well as by the omission of the word above mentioned.

First Report, p 232.

CHAPTER VII.

OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY.

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39. There is no provision in this Chapter for the offence of "riot" unless where *twelve* or more persons are assembled riotously, whereas by the Law of England the offence of "riot" may be committed by an assembly of *three* or more persons.

40. By the first printed draft an assembly of *four* or more persons might be a "riotous assembly." In the original manuscript draft the number of persons specified is *three* or more, according to the English Law.

41. By the Law of England when twelve or more persons riotously assembled, being commanded by proclamation to disperse, disobey such command by remaining together riotously for the space of an hour, it is an aggravated offence punishable by transportation for life. By the Bombay Code it is rebellion, punishable by imprisonment for 10 years, or fine, or both, when twelve or more persons assemble for riotous or rebellious purposes not amounting to treason. By the Madras Code twelve or more persons assembling for such purposes, or for the purpose of interfering with or obstructing the collection of the public revenue, and refusing to disperse, are punishable by imprisonment for a like period. It is an offence for *any number* of persons to assemble in a manner indicating an intention to commit an unlawful act, &c., if they refuse to disperse upon the order of the Magistrate, but it is lightly dealt with, the punishment being a fine not exceeding Rs. 50, or imprisonment not exceeding one month.

Reg. XIV. of 1827, S. 3.

Reg. III. of 1831.

42. The objects specified in Clause 127, any of which being designed by an assembly of twelve or more persons, gives the assembly the character of "riotous," are, 1st, the overawing the Government of India, or of any Presidency, or any public servant or body of public servants; 2d, resisting the execution of any law; 3d, committing any assault, mischief, or criminal trespass; 4th, wrongfully restraining any

person; 5th, putting any person in fear of hurt or assault; 6th, wantonly insulting or annoying any person; lastly, an assembly is to be deemed "riotous" if it is attended with circumstances which may reasonably excite apprehensions that its object is one of those aforesaid. Now, excepting the first object which it may be admitted is not likely to be attempted by an assembly which does not number more than twelve persons, it appears to us that there is none of those mentioned which may not probably be attempted riotously by a number of persons less than twelve, and we cannot but think that the law will be inefficient for the purpose of repressing riots if the number which shall be held to constitute a riotous assembly be not reduced. We would suggest in accordance with the English Law that *three* or more be substituted for *twelve* or more persons. We would then introduce into Clause 130 the words "of twelve or more persons," after the words "riotous assembly." The offences would by this alteration be, simple rioting, the offender being one of three or more persons constituting a "riotous assembly;" rioting, the offender being one of twelve or more persons constituting a "riotous assembly," with the aggravation of disobedience to a lawful command to disperse; rioting, the offender being armed; rioting, murder being committed by one of the rioters. In addition to the punishment for "rioting," according to the circumstances, the offender will be liable to the punishment of any other offence committed by him while "rioting."

Clauses 128 and 129.

130.

132.

133.

134.

43. Mr. Norton says that this Chapter appears to him "uncertain "and imperfect." As an instance he remarks that "rioting cannot be "committed unless persons *are aware* of the *facts* making an assembly "'riotous and unlawful,' as detailed in Clause 127, and intentionally "join or continue in it. Now this knowledge and intention are very "difficult to *prove*, and yet to make a party liable under Clause 130 they "would have to be proved, even though there be a refusal to disperse "after proclamation, for it is only those who commit the offence of "rioting (as above *defined* and *qualified*) who are punishable by Clause "130 for such refusal. A simple going and continuing with a riotous "assembly after such a proclamation is only punishable by one month's "imprisonment, or fine, or both, by a different Clause (135)." We have first to observe that Mr. Norton has misunderstood the Clause last mentioned, which applies *not* to a "*riotous* assembly," under Clause 127, but to "any assembly of twelve or more persons," whose design may not have been overtly shewn to be riotous, but which from the apprehension of danger arising from it has been commanded to disperse. With respect to a "riotous assembly," certainly to bring a person who joins it within the definition of a rioter in Clause 128, it must be proved that he was aware

of facts which gave it the character of "riotous," that is of facts shewing that its object was one of those specified in Clause 127, or that he was aware of circumstances reasonably tending to the apprehension that such was its object. But we do not perceive that there would be any extraordinary difficulty in proving the necessary facts and circumstances. It would be sufficient, we conceive, to give proof of significant overt acts, or of language used by the leaders, or passing among the members of the assembly, manifesting the object, so as to make it obvious to every observer. Where such acts had taken place, or such language had passed, the proof of them we should rather think would be easy. The intention of the party joining the assembly is to be inferred of course from his cognizance of facts characterizing the assembly as "riotous." By the Law of England to constitute a riot there must be a "common purpose of executing some "unlawful and violent act," or of executing any act whatever with violence, &c., which common purpose is a matter of inference from the overt acts of the assembly, their language, and gestures, as proved by evidence. The proof would be of the same character under both laws.

44. Mr. Cochrane objects to the qualification, "reasonably exciting "apprehension," "as allowing the opinion of the judge to be his rule of "action," but this is an objection applicable to every case in which it is necessary to infer the intention from the manner of proceeding and the concomitant circumstances. We need hardly say that every system of law admits of such inferences more or less, particularly the Law of England, as we have just noticed in this very instance of riot.

45. Mr. J. F. Thomas approves generally of the provisions of this Chapter, but thinks that they should not be applied to *ryots* assembled to resist unusual or heavy imposts, as it is the only way by which they can influence the public authorities. He is of opinion that unless the ryots are armed and use violence to individuals, they should not be held guilty of rioting. Mr. Thomas refers to Regulation III. of 1831 of the Madras Code which was intended specially for the suppression of such assemblies, as an enactment unwise, and a great source of oppression. He says, "The tendency of the law in this Presidency, where the "Collector and Magistrate is the judge in his own cause, as to what does "or does not overawe him, is to prevent all expression of public "feeling, an evil of great magnitude, and there can be no medium "whilst this oppressive law exists, between unlimited submission on the "part of the ryot, and rebellions such as we have lately seen in Canara."

46. We think it would be altogether inexpedient and improper to except a particular class of subjects from the operation of this law, or to

make it applicable to them conditionally, as Mr. Thomas suggests. An assembly of ryots may be as dangerous to the public tranquillity as an assembly of other men, and we believe that in fact the Regulation mentioned by Mr. Thomas was enacted in consequence of multitudinous assemblages of ryots in the very district named by him, which attempted to constrain the authorities rather by the mere demonstration of numbers than by show of arms—by passive rather than active resistance. It is obvious that whatever be the object or purpose of such assemblages, however peaceable the first intention, the very fact of the combination of masses of men is pregnant with danger, as must always be the case where there is a great aggregation of physical force, easy to be set in motion by any exciting influence, without any adequate means of checking or controlling it, ready to be applied on the instant.

47. Mr. Cochrane objects to the punishments in Clauses 130 and 132 as beyond the measure of the offences, while exception is taken to them, by some persons, on the other hand, as too lenient. It appears to us that the punishments are justly meted. They are greatly more lenient than those which may be inflicted under the Law of England; for example in the case provided for by Clause 130, viz., continuing in a riotous assembly after a command to disperse has been given in the manner prescribed by law, without any other aggravation, the punishment by the Code is imprisonment for a period not exceeding two years, whereas by the Law of England the offender may be transported for life. If the offender is armed, the Code makes him liable to imprisonment for an additional term not exceeding 2 years. The aggregate appears to us adequate, but not more than adequate to the offence. Clauses 131 and 132

48. Mr. Cochrane "protests against the enactment contained in "Clause 133," which, when murder is committed in a riot by one of the rioters, makes "every other person who at the time of the committing of "the murder, is committing the offence of rioting, as a member of the "same riotous assembly," liable to imprisonment for a term which may extend to 5 years, with or without fine. He says he "cannot see on "what possible principle it can be supported." He puts the case of a riot by 500 persons for the purpose of annoying some person, in which one of the rioters murders another, "can it be maintained for a moment," he asks, "that the 498 remaining rioters are each to be liable to 5 "years' imprisonment with unlimited fine?" On the other hand Mr. Norton says, "if a riotous assembly have the object of overawing the "Government, and in pursuance of that criminal object one of the party "commits murder, the others engaged in that common cause are only "liable to the punishment of 5 years' imprisonment and fine. I leave to "the judgment of others whether the English Law making this high

" treason and murder in all, is not the more reasonable of the two, even " if the latter be too strictly severe." Again Mr. Bacon says, " the " punishment should extend even to death (to all engaged in the riot,) " when homicide has been committed, and to imprisonment for life in " atrocious cases attended with wounding."

Clauses 130 and 131

49. The punishment of imprisonment for 5 years under the Clause in question may be enhanced to 7 years if the rioters shall have continued in assembly in spite of a command to disperse. By Regulation II. of 1823 of the Bengal Code, imprisonment for 5 years is the minimum to which a person convicted of affray attended with homicide may be sentenced by the judge trying the case, the maximum being 7 years; but the Nizamut Adawlut may enhance or mitigate the sentence at the instance of the judge. Possibly Mr. Cochrane contemplates the case of one rioter murdering another from some motive unconnected with the riot and not in prosecution of the object of it. If this is his meaning we agree with him that "the 498 remaining rioters" ought not to be liable to punishment as implicated in the offence of murder. But we do not understand that they would be so liable under Clause 133, which we conceive is to be construed, as Mr. Norton has construed it, as applicable only to a case in which murder is committed by a rioter in pursuance of the object of the riotous assembly; we think this is implied in the words " while committing the offence of rioting." If it should be deemed proper to make the intention more clear, for the words last quoted might be substituted the following, " in prosecuting the object of the riotous assembly of which he is a " member."

50. Before we pass from this Chapter, we have to consider the question noticed in para. 122 of our former Report, whether an affray should be made an offence independently of consequences. An affray according to the Law of England is committed when two persons or more fight in *public*, so as to cause terror and alarm among the Queen's subjects; it is distinguished from assault in that the latter offence may be committed in private, where it cannot cause terror or alarm; the latter therefore is regarded more especially as an offence against the person of an individual, the former as an offence against the public peace. It appears to us that neither the law of assault as touching two persons, nor the law of rioting as touching three or more persons (if amended as we propose) sufficiently provides for this offence as respects the public tranquillity especially, and we are inclined to think it advisable to introduce into the Code an express provision corresponding in substance with that contained in Article 222 of Mr. Livingstone's Code. This may be done by adding to this Chapter two Clauses in the following or other terms. "When two or more persons by quarrelling or fighting, or

" otherwise conducting themselves in a tumultuous manner in a public " place, disturb the peace of the inhabitants of the place, they are said " to commit 'an affray.' "

" Whoever commits 'an affray' shall be punished with imprisonment " of either description, for a term which may extend to one month, or " fine which may extend to two hundred rupees, or both."

51. It will be seen that we propose to transfer to this Chapter the Clauses which now stand as Clauses 275 to 282 in Chapter XV. of Offences relating to religion and caste, to be placed after Clause 137. Vide post.

CHAPTER VIII.

OF THE ABUSE OF THE POWERS OF PUBLIC SERVANTS.

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52. The propriety of the title of this Chapter is questionable, with reference to Clauses 139 and 150, which provide for offences which are not abuses of the powers of public servants, and which may be committed by persons not being public servants, and to Clauses 147 and 149, which provide for offences by public servants, which are not abuses of their powers as such. It is stated in Note E. that "this Chapter is "intended to reach offences which are committed by public servants, "and which are of such a description that they can be committed by "public servants alone," but this statement requires qualification with respect to the two Clauses first mentioned above. The following, adopted from the Digest of the English Criminal Law Commissioners, would seem to be a more suitable title for the Chapter,—"of offences by and con- "cerning public servants."

Chapter V. Section 2. "Offences by and con- "cerning judicial and othre "officers of justice."

53. "It will be seen," say the Commissioners, "that we propose, "under Clause 138, to punish with imprisonment for a term not exceed- "ing 3 years, or with fine, or both, the corruption of public function- "aries." Mr. Norton says, "I offer my humble tribute to the substantial "merit of Clause 138." The principle of this Clause and of the Chapter generally, is, however, strongly objected to by many persons.

54. The objection seems to be mainly this, that to render high functionaries liable to prosecution before the Criminal Courts, for imputed malversation, will tend to degrade such functionaries generally, and to diminish the respect of the public for them. Mr. J. F. Thomas has stated the objection most fully and distinctly. The following are his observations on the subject:

"The provisions of this Chapter as made applicable to men placed "in offices of the highest trust and responsibility, are questionable. I "doubt the policy of subjecting such men to any further penalties for "malversation than dismission with censure and disgrace.

"It must, I conceive, degrade the office and the whole class of "officers, and lower the standard of public character, if they are to be "restrained by penalties like those here provided.

" The ample remuneration, the estimation of society, and the loss " of these, can, it is admitted, alone maintain the standard of public cha- " racter; and nothing, I am satisfied, will be added to these sanctions, " unless the penalties are very severe.

" The removal of a British Resident at a Foreign Court guilty of " malversation, from his high post as representative of the British Go- " vernment, to the common gaol, (see illustration (*c*) at the head of " page 37,) will only prove injurious to the public interests by degrading " the office. It would be better, I should say, that he be dismissed with " public ignominy, and his degradation and punishment left solely to " society. In like manner it will not uphold the judicial character, but " on the contrary must tend greatly to its deterioration, both in the " European and Native, if, as provided in Clauses 142 and 143, Judges " presiding over Courts of great trust and power, may be brought *as* " *criminals*, on charges of the nature contemplated in these Clauses, and " sent to the common jail for one or two years.

" The arguments the Commissioners have used, respecting penalties " which consist in degrading exposure, &c. (Notes page 12) appear to " me to apply to the cases under consideration. For the imprisonment " provided in these Clauses, of but one or two years, would be a mere " subject of mockery to ' shameless and abandoned men ;' but when in- " flicted on men, ' who have filled the highest stations, and maintained " ' respectable characters, would be so cruel, that it would become more " ' odious to the public than the very offence which it was intended to " ' repress.'

" This, I am induced to believe, would be realized, especially in the " case of natives of family and great respectability, who might be taken " from their seats as judges, and imprisoned for some even trifling irre- " gularity, to the favor or disfavor of a party before them.

" The result would, I fear, be, that such men would avoid offices " which might subject them to such degradation, for acts which would " indeed be culpable, but which would be amply provided against by " simple dismission."

55. Mr. Thomas adds, " These observations I intend to apply " almost entirely to the imprisonment provided for several of the offences " described in this Chapter. Fine not commutable by imprisonment " but recoverable at any time, lies open only in part to the same objec- " tions." This qualification seems to be rejected by some of those

gentlemen who concur generally with Mr. Thomas. Mr. Hudleston, for example, says, " I hope that no such provisions will be enacted in this " country. The power of Government to dismiss from office, and of the " Home Authorities to dismiss from the service, with general rules such " as are contained in the Regulations, render such provisions as those of " this Chapter uncalled for." It is to be gathered from Mr. Hudleston's remark that he had in his mind only the Company's Covenanted Servants. And it would seem that this class of public servants is, at least, chiefly regarded in the remarks of others to the same effect.

56. It is more especially with regard to Judges that it is urged by some, chiefly by Mr. A. D. Campbell, that to render them liable to punishment, and particularly the punishment of imprisonment, by sentence of a Criminal Court, for malversation, will tend to degrade the judicial office. Mr. Livingston thus notices a similar objection to the provisions of his Code on this subject—" There are some who think that with res- " pect to the judicial office, it would be degraded by enactments which " suppose the possibility of its high functionaries being influenced by " such inducements as would bias other men. Confidence, they argue, " produces integrity, suspicion provokes to guilt; leave the high cha- " racters of your Judges to be sustained by their own sense of honor, " and do not fetter them with any of the degrading restrictions and " penalties that you devise to bind other men." " I acknowledge," says Mr. Livingston, " the force of the maxim that confidence in generous " minds begets a disposition to merit it, but I deny the propriety of its " general application. The penalties of the law are founded on a suppo- " sition that without them its precepts would not be fulfilled. Could " we count on that generous disposition which the objection supposes, " there would be no need of any sanction to our laws. The Legislator " need only point out his will and express his confidence in the inte- " grity of those to whom it was directed, and the work of legislation " would be done. But the argument is not pressed so far; it is ac- " knowledged that penalties are necessary to ensure obedience in ordi- " nary cases; but it is said the Judges form an honorable exception; " restrain all the world by the fear of punishment—trust to the inte- " grity of the Judge for the performance of his duty." Not seeing the reason of any such distinction, Mr. Livingston, however, makes Judges equally with other public functionaries liable to criminal prosecution for misconduct in office, and subjects them to the punishment of imprisonment as well as fine.

57. In England, if in any country, the Judges of the superior Courts might, on grounds such as are noticed by Mr. Livingston, be exempted

from responsibility under the criminal law, and left "unfettered by the "degrading restrictions and penalties devised to bind other officers." But though, as justly observed by the Criminal Law Commissioners, corruption in the exercise of a judicial office is an offence "which in "this country, as regards the higher Courts may be said to exist in "theory only, so rare are the instances, in modern times, in which that "high authority has been abused for unlawful purposes;" nevertheless, the Judges of England have been ever since the time of Edward III., and are now liable to criminal prosecution for default or malversation in office, and to punishment for the same by imprisonment and fine or forfeiture. So it is declared in Section 2, Chapter V. of the Digest of the English Criminal Law that "Justices (that is to say Judges of the supe- "rior Courts,) who shall be found in default on any of the points con- "tained in the oath required to be taken by them by a Statute of the "18th year of King Edward III."—and "whosoever being a judicial "officer shall abuse his authority by doing or omitting to do any act or "thing, wilfully or corruptly, or with the malicious intent to oppress or "injure any other person in violation of his duty as such officer"—shall incur the penalty of "imprisonment for any term not exceeding three "years, and fine at discretion."

5th Report, page 22.

Art. 1.

Art. 3.

58. Blackstone says, "In Judges, especially the superior ones, "bribery hath been always looked upon as so heinous an offence, that "Chief Justice Thorpe was hanged for it in the reign of Edward III." "This," say the Criminal Law Commissioners, "appears to have been "a mistake, and we have been unable to discover any ancient authority "by which such an offence was ever punishable capitally by the law of "England. It was, however, a misdemeanor at common law punishable "by fine and imprisonment." Accordingly in the Digest it is declared to be punishable by fine at discretion and imprisonment not exceeding three years.

Vol. IV. p. 140.

5th Report, page 20.

Art. 5.

59. As to the manner of prosecuting Judges the Criminal Law Commissioners say, "We conceive that although the ordinary mode of "proceeding against Judges has been by impeachment, an indictment "may be maintained against them as well as against inferior judicial "Officers."

5th Report, page 48.

60. With regard to public functionaries, not judicial, the restrictions and penalties of the Law of England are applicable to all without exception or distinction. The Prime Minister is liable to a criminal prosecution for the corrupt sale of an office at his disposal, for bribery, &c., equally with a meaner functionary; for the former offence the

Chap IV., Sec. 4, Art. 1.

punishment according to the Digest is imprisonment not exceeding two
Art. 7. years, or fine, or both; for the latter, imprisonment not exceeding one year with or without fine.

61. It is true that Mr. Hudleston and those who agree with him do not argue for the impunity of public servants who may commit offences such as are provided for in this Chapter, but for exempting them, particularly the Covenanted Servants of the Company, from amenability to the Criminal Courts, leaving them to be dealt with by the Government and the controlling authorities in England, who have the power to punish them by suspension or dismissal from office, or from the
Page 32. service. This kind of punishment as observed in the Note to the Chapter is one which bears with peculiar severity upon persons circumstanced as are the Covenanted Servants of the Company; moreover it is one which will probably be inflicted, in the higher or lower degree, upon any servant who may commit an offence which is punishable under the Code, notwithstanding he shall be sentenced to the penalty prescribed therein. Thus, it is represented, the culprit will be liable to a double punishment.

62. But the same may be said of any functionary who holding a valuable appointment, by misconduct forfeits it, and by the same misconduct renders himself obnoxious to the criminal law; of Lord Bacon, for instance, who was dismissed from the highest and most valuable office under the Crown, being at the same time fined £40,000, and sentenced to imprisonment during the King's pleasure. It may be said indeed, in a measure, of every servant who lives by his employment, and who for misconduct which brings him under the cognizance of a Criminal Court, and subjects him to a penalty by its sentence, is liable also to be dismissed by his employers. The reason of dismissal is the same in the case of the humble servant and in that of the high public functionary—the offender has proved himself unworthy of trust.

63. Further it is well observed by Mr. Greenhill that dismissal would be a penalty altogether inadequate in the case of a man who had made a fortune by official corruption. "The punishment of fine," say the Commissioners, "will, we think, be found very efficacious in cases of "this description, if the Judges exercise the power given them, as they "ought to do, and compel the delinquent to deliver up the whole of his "ill-gotten wealth."

64. We proceed to consider the provisions of this Chapter more particularly with reference to the remarks made upon them in the reports which are before us.

65. The first Clause provides at once for what in the Digest of the English Criminal Law is divided under several heads, as selling public offices, taking reward for recommending to office, &c., taking of bribes by ministerial officers, extortion by officers, taking undue fees, &c. It applies exclusively to persons being or expecting to be public servants, accepting, obtaining, or attempting to obtain, any gratification, for doing or forbearing to do any official act, favoring or disfavoring any party in the exercise of official functions, or serving or disserving any party with Government, or with any public servant. The next Clause applies generally to any persons accepting, &c., any gratification for inducing public servants so to act. This Clause is much more comprehensive than the English Law, which appears to punish private persons taking reward for influencing public Officers, only when their influence is used to procure office for a party. We think the generality of Clause 139 of the Code is expedient.

Clause 138.
Digest Ch. IV.
Sec. 4, Arts. 1, 2, 7.

Sec. 5, Art. 3, Ch. V., Sec. 2, Arts. 10 to 13.

Clause 139.

Digest.
Chap. IV., Sec. 4, Art. 2.

66. Objection is made by several Officers to including in Clause 138 persons "expecting to be public servants." But if a person expecting to be appointed to a public office obtains money from another as the price of favor to be shewn to that other in the exercise of his functions in that office, he is surely as corrupt as one who does the same being actually in office. It must be proved of course that he gave the other party reason to believe that he was about to obtain the office, it must be proved also, as appears by the first "explanation," that he himself expected to obtain it. In practice the provision would probably be brought into action only against persons who after having obtained the expected office are found guilty of the previous corrupt transaction, and generally only against persons who having obtained the expected office have acted officially in the corrupt manner previously promised.

67. Mr. Greenhill commenting upon Clause 138 puts this case—"A has done the Prince some service, and the Prince makes him a "present *for the past*—has A committed an offence?" He asks, "is "reward for *past service* not included? if not, the law would seem to "be defective, for it could seldom be shown that the reward was not "for some past service, and the motives could hardly ever be proved." If the present falls within the terms of the definition of legal remuneration subjoined to Clause 138, if, for example, it is what A as a public servant is permitted by the Government which he serves to accept "from the Prince," whoever *he* may be, for such service as A has rendered to him, it is obviously no offence in A to accept it. But if the service rendered by A to the Prince was such as he was bound to render

officially without any remuneration, or if it was such as he ought not to have rendered, his acceptance of a present at any time "as a reward" for rendering such service would certainly be an offence. The term reward is manifestly intended to apply to a "past service." What is forbidden speaking generally is the receiving any gratification "as a motive" to do, "or a reward" for having done any such thing as is described in the definition. It is explained that "a person may "receive a gratification as a motive for doing what he does not intend "to do, or as a reward for doing what he has not done." This explanation appears to be intended to guard against such a plea as, to refer again to that well known case, was set up as an excuse for Lord Bacon; "it is pretended," says Mr. Hume in his history, "that Bacon had "still in the seat of justice, preserved the integrity of a Judge, and had "given just decrees against those very persons from whom he had "received the wages of iniquity."

68. Mr. Norton who, as we have observed, approves of Clause 138, finds fault with Clause 139. He says, "I conceive Clause 139 is "of a far too general application. It may be very praiseworthy in a "party in some instances to exercise personal influence in obtaining a "favor for a friend, such as an appointment from an official person. "The thing itself being so, the *criminality* should hardly depend on the "meanness of the motive. It may be very mean to accept of any "*previous hire* in *any* case of this kind—but a subsequent *reward* may "possibly be a mere token of gratitude, and such as there may not be "even a shadow of meanness in accepting. It is carrying the principle "of excluding all shadow even of corruption somewhat too far to visit "such an occurrence as a crime punishable by imprisonment."

69. We think that Mr. Norton is wrong in his surmise that the criminality here "depends on the meanness of the motive." "It *may*," as he says, "be very praiseworthy in some instances to exercise personal "influence in obtaining a favor for a friend from an official person," in bringing, for example, a meritorious individual to the notice of an official person, and recommending him for an office at the disposal of that person, for which he is well qualified; but it *may* be very much the reverse, as, if the friend recommended is unworthy. The man who has used his personal influence with a public functionary to induce him to give an appointment to a friend, merely because he is a friend, who is unfit for it, may be as culpable as one who has exerted his interest to obtain an appointment in like manner for a person, merely for the sake of something he has obtained or expects to obtain from him, which falls within the definition of the term "gratification" in the explanation

subjoined to Clause 138, but the motive in the one case is sufficiently palpable for the law to deal with it, while in the other it is not so.

70. The selection of fit persons for the discharge of public functions is of so much importance, since upon the faithful execution by the officers employed in the public service, of the various powers entrusted to them, must the due working of the state machine for all practical purposes depend, that it is necessary to make every possible provision to prevent abuse in this respect, " but it is a duty which," as observed by the English Criminal Law Commissioners, " is so dependent on the " exercise of a discretionary power of judging as to fitness and qualifi- " cation for office, as in a great measure to exclude the possibility of " restraining by penal laws any abuse of the confidence reposed in those " who are by law invested with the power of selecting persons In an " important respect however the law interferes to prevent a practice " fraught with temptation to the parties invested with patronage, and " with mischief to the public, namely, the sale of public offices, by " punishing those who offend in this respect." It interferes also by punishing those who receive, or have any reward or profit for any interest, &c. made concerning or relating to any nomination or appointment to a public office. The English Law herein agrees with the Code in the Clause in question. It appears to us that Mr. Norton's observation as to a subsequent reward being possibly a mere token of gratitude applies with as much force to Clause 138, which he approves, as to Clause 139 which he disapproves; to a public servant receiving such a reward in gratitude for an appointment bestowed by him at some previous time, as to a private person receiving it in gratitude for the exertion of his influence through which such appointment was obtained.

5th Report, p 15

Digest Chap IV, Sec 4, Art 2

71. We come now to the provisions particularly affecting Judges. The first relates to the accepting of a gift by a Judge from a party whom he knows to be a plaintiff or defendant in any proceeding in his Court, which is punishable by imprisonment which may extend to 2 years, or fine, or both. The Commissioners say, " The mere taking of " presents by a public functionary when it cannot be proved that such " presents were corruptly taken, we have made penal only in one parti- " cular case," that is the one we are now to consider. " We have not " made the taking of presents by public functionaries generally penal," they continue, " because though we think it is a practice which ought to " be carefully watched and often severely punished, we are not satisfied " that it is possible to frame any law on the subject which would not be " rendered inoperative either by its extreme severity or its extreme " laxity "

Clauses 141 to 143

Note p 33

72 They proceed to explain distinctly the grounds on which they " have thought it advisable to leave this matter to the Executive Govern- " ment which will doubtless promulgate from time to time such rules as " it may deem proper, and will enforce submission to those rules by " visiting its disobedient servants with censure, with degradation, or " with dismissal from the public service, according to the circumstances " of every case " They then explain their reasons for making the one exception contained in Clause 141 in the case of a Judge, remarking by the way that the prohibition therein " does not extend to the taking of " food in the interchange of ordinary civilities." " It appears to us," they say, " that the objections we have made to a general law prohibit- " ing the receipt of presents by public functionaries do not apply to this " Clause. The rule is clear and definite. The practice against which it " is directed is not a practice which ought sometimes to be encouraged " and sometimes to be tolerated. It ought always and under all circum- " stances to be discouraged. It appears therefore to unite all the charac- " teristics which mark out a practice as a fit object of penal legislation "

73. Sir J. Awdry delivers his sentiments on the question whether the prohibition of receiving presents should be general, or limited as proposed in the Code, as follows. " One more observation I will make " on a point which though not very prominent in the Code goes to the " root of the unsuspected purity of our administration of justice, and " government in general. It is proposed to put an end to the prohibi- " tion of taking presents. That prohibition has been most beneficial, " and I cannot see that the reasons for it have ceased. The difficulty " of providing that it shall not operate harshly on native magistrates, " should be grappled with, instead of abolishing the whole law. The " difficulty of drawing a satisfactory line is no doubt considerable, but " much may easily be done. To receive a portion with an Asiatic bride " is no more illegal than to hire a house of an Asiatic—either may " become so, if colorable—neither is so in itself. In all cases of kindred " and affinity presents might be allowed This would at once provide " for the majority of cases in which they ought so to be, and would be " attended with no danger, because the kindred or affinity would be " a warning to the public. The situation of a disinterested functionary " who was at liberty to receive presents would be very painful, knowing " (as he must know) that their real object would be inconsistent with " his integrity, yet that their rejection would be an insult. The reasons " assigned for not making bribery in this country punishable in the " giver of the bribe are most satisfactory. They are in substance that " from the habits and circumstances of the country he is the victim of " what has to him the effect of extortion. That pressure must and will

" operate on his mind as long as the person whom he desires to propitiate " is known to be ready to receive, and ready he usually must be unless " the Government by its prohibition will relieve him from discourtesy " in refusing."

74. Upon the provision contained in Clause 141, Sir J. Awdry makes the following observations: " As regards a Judge's taking a gift " from one whom he knows to be a plaintiff or defendant in a suit before " him, this is still to be forbidden. But this (while it appears to me to " concede the principle) is totally inadequate. A Judge knows not one " tenth of the causes which are on the files of his Court, still less can he " bear in mind who are all the parties to each—still less, who, without being " nominal parties, are interested. But all these persons themselves, and " all their enemies, know; and important as the matter is to them, " they cannot conceive that it escapes the notice of the Judge. His " character therefore suffers—and that of the administration of justice " with it. But what is worse, this will most frequently happen to the " most impartial Judge. He whose attention habitually fixes itself on " the merits of the cause, not on the persons of the litigants, except as " prominent on the evidence, will most frequently receive in ignorance a " present which was intended for and will be understood as a bribe."

75. With regard to Sir J. Awdry's general observations we have to remark that the authors of the Code by no means intend absolutely to put an end to the prohibition of taking presents, but to leave the matter to be regulated discriminatively by the Executive Government. The general rule would still probably be prohibitive, with exceptions suggested by a liberal consideration of circumstances which render a relaxation of the rule expedient.

76. With such a rule and such exceptions discreetly permitted there would clearly be no ground for some of the objections urged by the learned Judge, as he appears himself to admit. We think, indeed, with respect to public functionaries in general, that every advantage that arises from the existing law would be secured under such regulations as it may be supposed would be passed by the Executive Government, enforced by the very efficacious means of punishment which the Government can employ. With regard to Judges the reasons assigned by the authors of the Code for the distinction they have made, appear to us sufficient to vindicate it. The terms of the Clause so nearly correspond with the terms of the oath required to be taken by the Justices of Her Majesty's Courts in England, on the same matter, viz. " Ye take not by yourself or by " other, privily nor apertly, gift nor reward of gold or silver, nor of any Statute 4, 18 Ed III.

"other thing which may turn to your profit, unless it be meat or drink, "and that of small value, of any man that shall have any plea or process "hanging before you, as long as the same process shall be so hanging, "nor after for the same cause," that it may be presumed the Commissioners had the oath before them when they framed the Clause. The argument of Sir J. Awdry as to the impossibility of a Judge bearing in mind who are all the parties in the causes before him, it is obvious to remark, applies equally to the responsibility arising from the oath, as to that which is imposed by the Clause in question. The oath required to be taken by the Company's Judges in like manner is directed against the receipt of presents from parties in suits in the Courts in which they sit.

Bengal Reg. V. of 1793, Clause II.

77. Mr. Norton appears to approve of Clause 141 in principle, but considers it "far too lenient to meet some cases." The punishment as before remarked is imprisonment not exceeding 2 years with or without fine. The punishment proposed in the Digest of the English Law is imprisonment not exceeding 3 years and fine at discretion. Considering that this provision is intended to meet cases where a corrupt motive cannot be proved, we think it is severe enough.

78. The next Clause 142 provides that "whoever being a Judge "pronounces on any question which comes before him in any stage of "any judicial proceeding a decision which he knows to be unjust, shall "be punished with simple imprisonment which may extend to 2 years, "or fine, or both." Objections to this Clause are made by many Officers, which may be summed up in the question of Sir H. Seton, "who is to "decide what is unjust, and how is the knowledge of it to be proved?" Her Majesty's Justices are required by their oath to "do equal law "and execution of right," that is, as it is expressed in the margin, "to "do justice" to all Her Majesty's subjects, and it is provided in the Digest that all who shall be found in default in any of the points contained in the oath shall be punished with imprisonment not exceeding 3 years and fine, with a saving Clause that "no judicial Officer shall "be criminally liable in respect of any error in giving judgment." It seems to us that a Judge, who by his decision, does injustice, *not* by error of judgment, is in other words a Judge who pronounces a decision which he knows to be unjust. We apprehend that the expression "which he knows to be unjust" was adopted purposely to exclude the excuse of an error of judgment, and that the meaning is that a Judge who pronounces a decision which is unjust without the excuse of an error of judgment, must be presumed to have pronounced the decision conscious of its injustice, and shall be liable to punishment accordingly.

Statute 4, 18 Ed. III.

Chap V. Sec 2, Art 1.

Art. 4

So understood, the Clause appears to us no more exceptionable than the English Law in the same matter as it is expressed in the Digest. Mr. A. D. Campbell suggests that the words "contrary to law" should be substituted for "unjust," "as it is not intended that the Code should "meet individual opinions of justice, except as these may coincide with "the sentiments of the Legislature;" but such a substitution would narrow the provision to a degree that would greatly impair its efficacy, for many a decision may be "unjust," which cannot be said to be contrary to any law, except the general law which requires justice to be done.

79. Again of Clause 143, which provides for the punishment of a Judge who "for any purpose of favor or disfavor to any party disobeys "any direction of the law of procedure," Sir H. Seton observes, that "all laws of procedure must be occasionally dispensed with, or become "intolerably oppressive, as in the case of sickness, &c., and every dis-"pensation must be matter of favor." To this we answer, that it must be presumed that the Code of Procedure will itself authorize such dispensing, and therefore in such case there will be no disobedience—it will be a lawful exercise of discretion, not an act of favor, to grant a dispensation when there is such cause for it.

80. Sir H. Seton questions the policy of the provisions in both these Clauses as "exposing persons in office to vague and vexatious "criminal charges." Mr. Norton and others also observe that the provisions in these Clauses would let in all sorts of vague and vindictive charges. Mr. E. Maltby speaking of Clause 142, particularly says—"this will give rise to criminal accusations instead of appeal." Mr. A. D. Campbell to the same purpose observes as follows. "The present law "giving to the unsuccessful suitor the right of appeal, has hitherto "operated here as a sufficient practical check against judicial decisions "contrary to law or justice; but as here proposed, to convert this "simple *civil* remedy against the *suitor*, into a criminal proceeding "against the Judge himself, will put an entire stop to the administration "of justice. Judges, like all men, are extremely fallible; and their "errors are ever liable to be attributed to wrong motives—all indepen-"dence and self-confidence will therefore be entirely lost, and the "Judges completely paralized, if the vindictive passion of the "disappointed, amongst the most litigious people in the world, are let "loose to inundate the tribunals with a flood of petitions against the "Judges themselves, instead of against the suitors." "Be the punish-"ment of judicial corruption what it may," he says again, "it is abso-"lutely necessary to the independence of the Bench that every Judge "should be irresponsible to his suitors." Mr. Casamajor says "much

" depends on the Code of Procedure;" " before what tribunal," he asks, " are the offences in Clauses 141, 142, and 143, to be prosecuted?"

81. Mr. F. N. Maltby makes the following general observations which appear to us worthy of attention—" I believe there are few who " have watched the actual working of our Government in the provinces, " who have not found reason to doubt whether, in our endeavors to " protect the people from oppression on the part of the servants of " Government, we have not gone too far ; and weakened the power of " our native servants. It is as necessary that they should be supported " in the honest discharge of their duties as that those under them should " be protected from oppression. Although, therefore, I do not venture " to offer any remarks upon the punishment to be awarded when delin- " quency is proved, I would beg to observe that it will depend upon " the Code of Procedure whether this Chapter is an useful or a most " prejudicial one. It must be most prejudicial if the form of procedure " should allow of public functionaries being dragged before the *Criminal* " *Tribunal*, upon charges, preferred in the usual form, of offences under " this Chapter. I am sure that not a native functionary will feel " confidence in the discharge of his duties if this Chapter is enforced by " the ordinary tribunals. It is necessary that the form of procedure " should be such as shall, as far as possible, protect the Officer of " Government from annoyance, until delinquency is proved; and I " need hardly add how necessary it is that false charges should be " severely punished. Should it be so arranged that a mere charge of " these offences, preferred before a Magistrate, shall put the accused on " his defence before that tribunal, the provisions of this Chapter must. " have a most prejudicial effect. The principle of the Madras Code of " making the public officer amenable to his superiors under rules differ- " ing in this respect from the ordinary course of criminal procedure, " appears to me to be best adapted to the purpose."

82. The suggestion contained in the last sentence of the above extract from Mr. Maltby's Report is one which we think ought to be taken into consideration in framing the rules for giving effect to this Chapter, unless the general system of criminal procedure shall embrace the institution of a public prosecutor. If such an office should be established it would be sufficient to make it the general rule that charges founded upon the provisions of this Chapter should be received by the criminal tribunals only at the instance of the public prosecutor. The authors of the Code themselves propose to withhold from the cognizance of the criminal tribunals offences such as are provided for in Clause 149, namely, neglect of duty, disobedience of orders, &c. by public servants,

Note p. 36.

which they think should be dealt with by the official superiors of the offender. In this opinion we agree with them.

83. Clause 145 is very comprehensive, including, apparently, offences separately provided for by several Articles of the Digest, as Articles 1 and 2, Section 5, Chapter IV., and Article 3, Section 2, Chapter V. respecting the abuse of official authority, and Articles 14 to 16, Section 2, Chapter V. regarding officers omitting to arrest offenders and suffering prisoners to escape, so far as the offence is voluntary, and in general any breach of official duty, by which it is intended, or which is known to be likely to injure any party, or to save any person from legal punishment.

84. Clause 146 again provides specially for public servants charged with the preparation of documents, violating their duty in this respect, with the like intention, including among others the specific offences in respect to judicial records defined in Articles 8 and 9, Section 2, Chapter V. of the Digest. Mr. Norton observes that this Clause " incorporates in " too general and vague language a variety of specific crimes which may " be construed to fall within it." The Clause is comprehensive, but not indefinite. It appears to us that nothing can be brought within its terms which ought not to be punished as it prescribes.

85. Mr. Norton thinks that such " breaches of contract" by public servants as are specified in Clauses 147 and 148, are not proper objects of criminal law. They are not however breaches of contract, that is breaches of conditions privately arranged between the party to be served and the party engaging to serve, which appear to be intended here, but breaches of conditions imposed by law upon public servants. These provisions are analogous to that contained in Article 12, Section 2, Chapter IV. of the Digest for the punishment of persons " doing any " matter or thing prohibited (by Statute) to be done." The punishment is the same, viz. imprisonment not exceeding 3 months, or fine or both.

86. It remains for us to consider the reasons assigned by the Commissioners for not making bribery punishable in the giver of the bribe when he gives it in compliance with a demand, however signified, on the part of a public servant; the person who, without any demand express or implied, volunteers an offer of a bribe to a public servant and induces him to accept it, being punishable under the general rule contained in Clause 88 as an instigator. The reasons are that " corruption " does prevail to a great extent among the lower class of public func- " tionaries (in India), that the power which those functionaries possess

Note E. p. 37.

" renders them formidable to the body of the people, that in the great " majority of cases the receiver of the bribe is really the tempter, and " that the giver of the bribe is really acting in self-defence." " Under " these circumstances," say the Commissioners, " we are strongly of " opinion that it would be unjust and cruel to punish the giving of a " bribe in any case in which it could not be proved that the giver had " really by his instigations corrupted the virtue of a public servant " who, unless temptation had been put in his way, would have acted " uprightly." Sir J. Awdry, as appears above, thinks that the reasons assigned by the Commissioners " are most satisfactory." Mr. Norton on the contrary says, " I cannot concur in the reasoning of Note E by " which the criminality of giving bribes is omitted from the Code. It " assumes that the administration of justice and of public functions is " so corrupt that a man cannot attain his fair right but by bribery. " If this be true I do not think the end sanctifies the means, and I " consider it a very inexpedient principle to avow and act upon."

87. Mr. G. W. Bacon says, " With reference to the Note on the " impunity of bribers (pages 36 and 37) I must submit my opinion, " that the Commissioners altogether mistake the state of the case. There " is very rarely if ever occasion for extortion on the part of the receiver " or for self-defence on the part of the giver. All act in strict conformity " with the immemorial custom of the country, that no inferior shall " approach a superior, more particularly a public functionary, without " a present in his hand to obtain favor generally, without any particular " object. No Police Darogah or Moonsiff, and very few of the higher " natives possessing power, ever pay for any thing, and are fed and clothed " by the people. If an individual require a particular boon, such as a " decree in his favor, he has only to outbid his antagonist, and this not " at the request of the officer, but as a matter of course. How could " he expect favor, when the other party paid higher? Nothing is more " common than for an appellant to state in his petition that the Sudder " Ameen or Moonsiff decided against him, notwithstanding the payment " of such a sum, or that the decree against him was given in conse- " quence of a higher bribe administered by the opposite party. Now the " appellant does not mean to state that there is any thing extraordinary " in this, or that the Native Judge has acted wrong or irregularly in " taking his money, or that of the other party, but merely that it is hard " he should have got nothing for his present, and the giving which was a " matter of custom, and an unquestionable and well known fact. It is to " be remarked, that this is never given as a cause of dissatisfaction in " appealing from the decree of an English Judge, because it is neither " the native custom to bribe those officers, nor theirs, to receive. In the

" eyes of the natives there is no crime either in giving or receiving bribes, " and if we are desirous of impressing them with a different notion, we " must punish both giver and receiver, for both are only acting in com- " pliance with the customs of their ancestors, and one is not more guilty " than the other."

88. It appears to us that Mr. Bacon's observations go to confirm the accuracy of the reasoning of the Commissioners. If, as he says, " when " an individual requires a particular boon, such as a decree in his favor, " he has only to outbid his antagonist, and this not at the request of the " officer, but as a matter of course," what is this but to say that " men " give bribes because no man can without a bribe obtain common justice." In such a state of things the Commissioners " think that the giving of bribes " is not a proper subject of punishment." By punishing the receiver they endeavor to strike at the root of the evil. If they rested here we should not think they had done enough, for in India as in England there are situations in which " the giver is generally the tempter, the receiver is " the tempted." We may instance cases in which a Moonsiff or a Darogah, for example, is stationed in the heart of a large Zemindary, the Zemindar of which is rich and powerful, and whose ambition is to make his will predominant within its bounds. It is an object to him with this view to gain over the Moonsiff and the Darogah, or the Civil Judge and the Officer of Police, and he will be ready to tempt them with bribes to serve his purpose, making occasion by bringing a suit against one man before the Moonsiff, and against another laying a criminal charge before the Darogah. The Commissioners intend the general provision in Clause 88 regarding abetment by instigation to meet such cases. By Clause 138 a public servant receiving a bribe is liable to imprisonment for 3 years. So also under Clause 88 is the person instigating him to receive the bribe. We are inclined to think with the Commissioners that this provision will answer the purpose sufficiently.

Note E. p. 37.

CHAPTER IX.

OF CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS.

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89. In the Note upon this Chapter are the following observations, which explain the manner in which it was prepared, and the principles of the classification observed in it.

Note F. p. 38.

" We were at first disposed to have one Chapter for contempts of " the lawful authority of Courts of Justice, another for contempts of the " lawful authority of Officers of Revenue, and a third for contempts of " the lawful authority of Officers of Police. But we soon found that " these three Chapters would be almost the same word for word. It " appeared to us also that, in the existing state of the Civil Administra- " tion of India, the separation which we were at first inclined to make " would produce nothing but perplexity. The functions of Magistrate " and Collector are very frequently united in the same person: and that " person is perpetually called upon, both as Magistrate and Collector, to " perform acts which are judicial in their nature, to try offenders, and to " decide litigated questions of civil right. While the division of labor " between the different departments of the public service is so imperfect, " it would be idle to make nice distinctions between those departments " in the Penal Code."

" In order to frame this Chapter we went carefully through the " existing Regulations of the three Presidencies, and extracted the " numerous penal provisions which are intended to enforce obedience to " the lawful authority of different classes of public servants. Having " collected these provisions, and discarded a very few which we thought " obviously unreasonable, or superfluous, we proceeded to analyse the " rest."

" It is possible that our analysis may be imperfect; and it is highly " probable that the punishments which we propose may require some " modification. It will be seen that we propose the same punishment " for all the offences which fall, in our analysis, under the same head. " For example, one head is the omitting to obey the lawful summons of

" a public servant. For this offence we have only one punishment; and " this punishment will be applicable alike to the witness who omits to " obey the lawful summons of a Moonsiff, to the Putwaree who in Bengal " omits to obey the lawful summons of the Collector, to the ryot who in " the Madras Presidency omits to obey the lawful summons of the Col- " lector, to the trader who in the same Presidency omits to attend a " meeting lawfully convened for the distribution of the Vizabuddy. In " the same manner we propose one punishment for the Captain of a Ship " in the Hoogly who illegally refuses to admit a Custom House Officer " on board, for a landholder who refuses to admit a Surveyor lawfully " commissioned by the Collector to measure land, for a distiller who " refuses to admit the proper Officer to examine his distillery. Again, " we propose the same punishment for the person who resists the taking " of goods in execution under a decree of a Court of Justice, for the " person who resists the taking of property by way of distress for arrears " of revenue, for the person who resists the seizure of salt by lawful " authority, for the person who resists the seizure of a boat in default of " toll by lawful authority, for the person who resists the seizure of " smuggled goods by lawful authority."

90. " We are sensible," the Commissioners proceed to say, " that " there may be reasons which have escaped us for making distinctions in " punishment between offences which in our classification fall under the " same head. But it is impossible to find in any person, or in any small " body of persons, so extensive and minute a knowledge of every pro- " vince of India, and of every department of the public service, as would " be a security against errors of this description. We have no doubt " that if His Lordship in Council directs the Code to be published for " general information, valuable suggestions will be received from " Servants of the Company in different parts of India, and that those " suggestions will enable the Government to modify the provisions which " we propose, by introducing proper aggravations and mitigations."

91. Referring apparently to the observation last quoted, Mr. Norton remarks that " the Commissioners seem themselves to distrust " the policy of many of the provisions in this Chapter, and they are " conscious of the need of some modifications." He then offers particular criticisms. First, he observes, as regards the " instances " of obstructing public Officers in the execution of their duty enu- " merated and provided against in Clauses 153, 164, 166, 168, 171, " and 173, it might be enough to say that these Clauses display a need- " less and perplexing list of qualifying circumstances, and gradations of " criminality, instead of a plain denunciation of a substantive offence."

92. Such a denunciation as Mr. Norton suggests might be perplexing because of its generality, as involving under one head and subjecting to one penalty, instances of obstruction to public Officers in the execution of their duty capable of being distinguished, and of different degrees of importance, but we cannot perceive how any perplexity can arise from the particularization which Mr. Norton here objects to, even if it be not absolutely necessary.

93. " But," he proceeds to remark, " these Clauses offend also, in " common with almost all the others, in another respect of far greater " importance." This it seems is the " almost unlimited latitude afforded " to arbitrary constructions." He refers particularly to Clause 182, touching disobedience to local orders promulgated by public servants, and to other Clauses, as Clause 155 regarding persons not attending in obedience to the orders of a public servant, Clause 152, regarding persons absconding to avoid service of a summons or notice from a public servant, Clause 157, regarding persons not furnishing information to a public servant when they are legally bound to do so, Clause 170, regarding persons bidding at a sale ordered by a public servant, not intending to fulfil the obligation incurred thereby, as being especially liable to such arbitrary construction. " It appears to me," he says, " that under such " Clauses as these a number of acts may be ranged as offences punish- " able by imprisonment which I can hardly suppose to have been intend- " ed to be visited as crimes at all. It may be asked, if letting judgment " go by default by not appearing by Attorney or in person to answer a " bill in Equity or to plead to an action at Law is a crime? It may be " asked what is 'absconding' to avoid process? Is a debtor turned " into a criminal for keeping out of the way of arrest, or out of the way " of even any notice by any public servant by whatever means?" " What is the criterion of bidding without *intention of performing all the* " *obligations*, &c. To proceed in multiplying such instances would be " endless."

94. Mr. Norton thinks that all the Clauses in question are liable to arbitrary construction, especially from the excessive latitude of Clause 14, which describes " public servants." We have noticed this objection to Clause 14 before. We shall only observe here in general, that if Clause 14 with all its particularity affords room for arbitrary constructions of the penal provisions touching contempts of the lawful authority of public servants, it must at any rate be less objectionable in that respect than the article which defines the corresponding term " officer" in the Digest of the English Criminal Law, as follows: " The term

Chap IV., Sec. 1, Art 1. " 'officer' shall be deemed to signify any person invested with autho-

" rity to execute, and legally bound to execute any public duty." The speciality of the definition in Clause 14 of the Code in effect restricts it, but here there is no restriction at all.

95. We shall consider the Clauses noticed by Mr. Norton in the order in which they stand in the Chapter, and first we have to consider Clause 152, which provides for the punishment of a person *absconding* in order to avoid being served with a summons or notice proceeding from any public servant *legally competent as such public servant* to issue such summons or notice. The first remark that occurs to us on this Clause, with reference to Mr. Norton's suggestion of its liability to arbitrary construction from the indefiniteness of the term " public servant" is that there is a precision in the words of the Clause adjective to that term, which to our apprehension fixes the meaning so as to prevent any mistake in that respect at least. There appears to us to be no room at all for arbitrary construction when it is positively declared that the summons must proceed from *a public servant legally competent as such*, to issue it.

96. The same qualifying terms are used in Clause 155, to which this remark therefore equally applies. In the other Clauses also to which Mr. Norton adverts, it appears to us that the public servant intended is so distinctly indicated, that on this point but one construction is admissible.

97. With regard to the term " absconding" in Clause 152, the signification of which Mr. Norton thinks questionable, we have to observe, that it is frequently used in the same connection in the existing Regulations, and we are not aware that there has ever been any misunderstanding about it. We do not think it likely, as Mr. Norton apparently does, that any person who might have to apply Clause 152, when he read that " whoever absconds in order to avoid being served " with a summons proceeding from any public servant legally competent " to issue such summons" is liable to punishment, would have reason to ask " what is absconding to avoid process?" any more than the Magistrates who have had to apply Section IV. Regulation XI. of 1796 of the Bengal Code, for example, have found reason to question what is meant in the first Clause thereof, by a person " absconding" " so that upon a " process issued against him" " he cannot be found."

98. As to the generality of the provision in this Clause which Mr. Norton seems to object to, there can be no question, we conceive, that any person who being aware that a Court, for example, has issued a summons

or notice of any kind to be served upon him, absconds in order to avoid being served with it, is guilty of a contempt of the lawful authority of the Court, of the same kind as if having been served with the summons he disobeys it. It is futile to give a Court or any public servant authority to issue a summons if no penalty is provided for the evasion of it; as well as for the neglect of the requisition contained in it, when it has been served. Of course the evasion must be proved to have been wilful, and the evasion being wilful, implies that the party knew of the issue of the summons. The Clause in question goes beyond the existing Regulations, but it is understood that their inadequacy on this point has been productive of considerable inconvenience and impediment to the course of justice, particularly in regard to witnesses. To remedy this defect so far, a Clause was introduced into the Civil Code compiled by Mr. Millett, providing for the punishment of witnesses absconding to evade a summons, in the same manner as witnesses not attending after having been summoned.

Part III Section XXXI Clause 2.

99. It is with reference to Clause 155, we presume, that Mr. Norton says it may be asked, "whether letting judgment go by default in an Equity suit or an action at law is a crime." We think that such a question could not be asked reasonably, for it is obvious that it is only disobedience to a positive order absolutely requiring the attendance of a party that is punishable under Clause 155, which is not the case in the instances put by Mr. Norton, in which it is optional with the defendant to answer, or plead, subject to judgment by default if he fail to do so.

100. The same punishment, viz. imprisonment of *either* description which may extend to one month, or fine which may extend to 500 Rupees, or both, is prescribed in Clauses 152 and 153 and from 155 to 157, the object in all being similar, that is to enforce the forthcomingness of persons, and of documents, and the rendering of information requisite for the public service according to law. It has been observed by several Officers that this punishment, though it might be generally adequate, would be insufficient in some cases, as, for instance, to prevent the absconding or to enforce the attendance of a principal witness in a civil or criminal proceeding of importance, in which it might be the interest of a party concerned to give the witness a reward for absenting himself, such as would more than compensate him for the imprisonment of one month and the fine of 500 Rupees to which he would thereby be liable. With reference to Clause 156, respecting the non-production of documents, Mr. Greenhill puts the following case. " A sues B for an estate. " C has the title deeds or a document by which A's claim would be " proved. C omits to produce it on the order of the Court, and pays the

" fine of 500 Rupees—has A no other remedy? Again, " A has the " custody of survey papers and accounts, and deeds of great value to " Government, and refuses to deliver them up"—" can A be punished only " as above?" Mr. Pyne says, " A Mamlutdur or Koolkurnee is legally " bound to deliver up a public paper to the Collector," " but which he may " decline to do. By our Revenue Law (Bombay) such refusal subjects " the detainer of these papers to imprisonment till he delivers them " up. To substitute one month's imprisonment in lieu of the existing " penalty is not only to render the records of Government very insecure and liable at all times to be withheld, but to create serious " inconvenience if not positive evil to the community, particularly " the agricultural portion of it." Mr. A. D. Campbell, also referring to Clause 156, suggests that the imprisonment should, as in the Madras Code, endure until the culprit conforms with the conditions of the law; a suggestion which is supported by others. Mr. Pycroft thinks that a larger term of imprisonment should be authorized, and the fine unlimited, on the principle explained in the Note to the Chapter on Punishments.

101. The provisions in the Digest of the English Criminal Law applicable to the offences described in Clauses 153, 155, and 156, authorize a much severer punishment, viz. imprisonment for 1 year, or *fine at discretion*, or both—and we are inclined to think that to make Clauses 155 and 156 effectual, it is necessary to leave the amount of fine unlimited. In the Note to the Chapter on Punishments the case of a man suborned to commit perjury by a great bribe is given to prove the expediency of not imposing a limit to the fine. The principle is that " no man ought ever to gain by breaking the law." This principle appears to us applicable to a party bribed not to appear upon a summons or order, or not to produce some document of importance, as well as to a party bribed to give false evidence, since justice may be defeated by a witness failing to appear to give evidence which is essential and which he alone can give, or by failing to produce an essential document, as well as by a witness giving false evidence. We see no greater probability of the power being abused in such cases than in many others in which the fine is unlimited. We would also extend the maximum term of imprisonment under these two Clauses to a period not exceeding 6 months. The punishment would then be the same as is provided for persons refusing to take an oath, &c. or to answer after having taken an oath in Clauses 159 and 160.

Chap. IV., Sec. 3, Art 1, Sec. 2, Art 14
Chap V., Sec 4, Art. 1.

p. 6.

102. Clauses 158 and 163 provide for the punishment of persons who wilfully give false information to public servants. It is proposed in the Digest of the English Law to punish offences of this kind under the

Chap. IV, Sec. 6, Art 1.

head of "Deceits on public Officers," with imprisonment not exceeding 2 years, or fine at discretion, or both. The punishment prescribed in these Clauses is imprisonment of either description, which may extend to 6 months, or fine which may extend to 1,000 Rupees, or both. When false information is given upon oath, the offender is punishable under Clause 162 with imprisonment not exceeding 3 years, and not less than 6 months, and is also liable to fine. When the false statement amount to false evidence as defined in Clause 188, the offender is punishable more severely under Clause 190. We propose, as explained in a subsequent para., to omit the minimum in Clause 162.

103. It is objected to Clauses 159 and 160 that they will be less effectual than the provisions of the existing Regulations by which recusants are liable to be imprisoned until they consent to answer, &c. But the existing law limits the fine which may be imposed upon persons so offending to 500 Rupees. The Code proposes to limit the imprisonment and to leave the fine unlimited, which seems to be preferable. Under the present law, we apprehend, it would be deemed a great stretch to protract the imprisonment of a recusant witness beyond 6 months; which is the maximum prescribed by these Clauses.

104. It has been suggested that there should be a provision of "toties quoties" till the order is executed. Mr. Greenhill puts the following case. "A sues B; C only can prove the claim, but refuses to "answer, and is imprisoned 6 months. Does A lose his suit without "remedy? or may C be called up and on refusal again committed to "prison, and so on till he answers?" It may be presumed that there will be rules on this subject in the Code of Procedure, to which it properly belongs. We conceive that there should be provisions for treating continued recusancy after punishment has been inflicted, as a fresh offence, making the offender liable to a repetition of punishment, when such recusancy is calculated to defeat the ends of justice. These Clauses leave the matter as it is left by Article 1, Section 4, Chapter V. of the Digest.

105. With reference to Clause 157, which provides for the punishment of a person intentionally omitting to give notice or to furnish information to any public servant in the manner and at the time required by law, Mr. Pyne observes that by the Bombay Regulations specific penalties are provided for non-compliance with requisitions of public Officers for information, and suggests that it is not consistent that both should continue in operation. We apprehend that the general provision in this Clause is intended to supersede all special provisions of the same

sort, as the Code generally is intended to supersede all the existing penal laws. We are at a loss to discover any ground for Mr. Norton's apprehension that this Clause will afford scope for arbitrary constructions.

106. Clause 161 provides for the punishment of a person refusing to sign any statement made by him when required to do so by a public servant, with imprisonment of either description which may extend to 3 months, or fine to the amount of 1,000 Rupees, or both. Upon this Mr. J. F. Thomas observes as follows—" In practice it has always appeared " to me that the signature to a statement made before any public autho- " rity is almost an unnecessary form when the statement is attested by " the public Officer. I should hold it quite unnecessary to impose any " penalty beyond a very trifling fine for the refusal to sign, and should " declare the attestation alone of the public Officer accompanied by a " note *in his own hand* that a party refused or declined signing the " statement to be a sufficient authentication, and that the statement so " attested should have the same validity as if it had been duly signed by " the party. This would take away the necessity of a penal enactment." Mr. A. D. Campbell concurs with Mr. Thomas. The existing Regulations for the Company's Courts, require the depositions of witnesses to be subscribed by them, and provide the same punishment for the refusal of a witness to subscribe his deposition, as for refusing to give evidence. On this point we would follow the suggestion of Mr. Thomas. But in every such case the Officer attesting the statement should be bound to express the reason given by the party for refusing to sign it.

107. Of Clause 164, for the punishment of a person preventing or obstructing a search by a public servant, Mr. Hudleston observes that it is " too wordy—too particular." He objects to the provisions here and elsewhere for punishing " annoyance," observing that the term " is too " vague to be properly used in a Criminal Code." His Colleague, Mr. A. D. Campbell, on the other hand, says, " I do not see any valid " objection to these Clauses (163 and 164) 'annoyance' is perhaps rather " a vague term; but it is easy to object to a particular word, yet very " difficult to suggest a preferable one."

108. A practical objection made to this Clause is that the punishment is inadequate. We think that the fine should be limited, but it appears to us that the maximum may properly be extended from 500 to 1,000 Rupees. The punishment for this offence under the general article respecting " Obstructions of Officers" in the Digest, is imprisonment not exceeding 1 year, or fine at discretion, or both. But the Code has a Clause, 165, for the infliction of additional or cumulative punishment for

any other offence, as an assault, which may be committed in committing the offence described in Clause 164.

Clauses 166, 167, 168, and 169
171, 172, 173, 174.
175, 176.
179, 180.
182, 183.
184, 185
186, 187.

109. The Code provides likewise for similar aggravations in committing the following offences, obstructing the taking, or the sale of property, resisting arrest, rescuing from custody, escaping or assisting escape from custody, insulting or interrupting a public servant in the discharge of his duty, acting in disobedience to the lawful order of a public servant in a matter affecting the public safety, &c., holding out threats to prevent a public servant from performing his duty, or to prevent a person from applying to a public servant for protection.

110. Clause 170 makes it penal to bid at a public sale for property on account of a party who is under a legal incapacity to purchase it, or to bid for it not intending to complete the purchase, or as it is expressed "to perform the obligations under which the bidder lays himself by such "bidding." Considering such proceeding as a contempt, and as an obstruction to the public service, it appears fit to punish it, but we see no reason for the fine being unlimited. In Clause 168, which provides for the punishment of a person obstructing a public sale, the fine is limited to 500 Rupees, the term of imprisonment being one month as in Clause 170. We would limit the fine in Clause 170 to 500 Rupees. By Clause 3, Section 14, Regulation II. of 1822 of the Bengal Code now rescinded, a person bidding at a public sale and not concluding his purchase was liable to a fine of 100 Rupees, or imprisonment for 15 days. By the existing law at Madras, persons bidding who are legally incompetent to purchase, are liable for the second offence to fine and imprisonment without limitation. Mr. Norton upon this Clause, as we have observed above, asks, " what is the criterion of bidding without intention of performing " all the obligations, &c." We can only say that we see no need for any peculiar criterion. The fact that the bidder did not intend to complete the purchase must of course be proved by such evidence as is ordinarily admitted in similar cases.

Reg. XXVI. of 1802, S 21.

111. In Clauses 171, 173, 175, 177, and 178 are provisions for the punishment of resistance to arrest, the rescue of prisoners, escape of prisoners from custody, and the harbouring of persons ordered to be taken into custody or who have escaped from custody. In the next Chapter, under the head of Offences against public justice, are further provisions for the punishment of prisoners *under sentence* escaping from custody, &c. The punishment for resisting an arrest, and for rescue, is imprisonment which may extend to six months, or fine, or both. The punishment for escaping from custody is imprisonment which may

extend to three months, or fine, or both. For harbouring a person ordered to be taken into custody the punishment is imprisonment to one month, or fine which may extend to 200 Rupees. For harbouring a person who has escaped from custody the imprisonment may extend to two months, and the fine to 500 Rupees. Many experienced Officers have objected to these punishments as too lenient. In the case of a state prisoner, or a murderer, or a dacoit, for example, it is thought that the punishment denounced in Clauses 171 and 173 respectively, will be inadequate to deter the friends of the offender from resisting an attempt to take him into custody, or from rescuing him from custody. Again it is observed that imprisonment for three months under Clause 175, would not deter a person apprehended for a serious offence, whose punishment might be imprisonment for 14 years, from attempting to escape.

112. By the Digest of the English Criminal Law persons resisting apprehension or escaping from custody not under sentence are punishable with imprisonment which may extend to 2 years, and in felonies to 3 years; the rescue of prisoners not under sentence is punishable with imprisonment which may extend to 3 years, and in cases of felony and treason with transportation for 7 years or imprisonment not exceeding 3 years.

Chap. V. Sec. 5, Arts. 1 to 4.

Arts. 9.

Art. 10, 11.

113. The terms of imprisonment thus authorized are very long compared with those of the Code, but it is to be considered that by the Code the amount of fine, which may be added to the punishment of imprisonment, is unlimited, and that when the offence is aggravated by the commission of an assault or any other offence at the same time, the offender is liable to additional punishment. Thus in a case of rescue, for example, if an assault were committed attended with hurt, the offender would be liable to imprisonment for 6 months for the rescue and for 1 year in addition on account of the hurt, and to fine at the discretion of the Court. It has been suggested that there should be a gradation with reference to the nature of the charge against the person whose arrest is resisted, or who has escaped, or been rescued from custody, and we are inclined to think it advisable to follow the Digest on this point. The Digest prolongs the term of imprisonment when the offence charged is a felony, that is an offence punishable with transportation. We would provide in the Code for an extension of the term of imprisonment from 6 months to 1 year when the offence charged is punishable by imprisonment which may extend to 7 years.

114. The same modification we think advisable in Clauses 177 and 178 respecting "harbour;" we would suggest that the punishment in

these Clauses be doubled when the offence charged against the person harboured is punishable by imprisonment which may extend to 7 years. It is to be observed that when harbour is given to one who has committed an offence punishable with imprisonment for 7 years or upwards, with the intention of screening him from justice, it is called subsequent abetment, and is punishable under Clause 107 with imprisonment which may extend to 6 months, or fine to 1,000 Rupees, or both. We have already suggested a modification of the exceptions to these Clauses in commenting upon the exception to Clause 107 to the same effect.

First Report p 226 to 232

115. Of Clause 179, which provides for the punishment of persons insulting or causing interruption to public servants in the discharge of their public functions, Mr. Hudleston observes that it is open to enormous abuse, and in the case of the lower native servants would lead to false charges. Mr. A. D. Campbell would strike out the words "offers any insult," or insert "above the rank of a common Peon or Chuprassie." Colonel Sleeman suggests that there should be one Clause for the offering of insult to be punished as here proposed, and another for the mere causing of interruption, to be punished with fine, and imprisonment only in default of payment of the fine. He thinks that this distinction is much wanted.

116. We think that the objections to the provision regarding insult in this Clause are overstrained. Clause 485 provides generally for the punishment of any person intentionally offering insult to another, and we see good reason as regards the public peace for this provision. But if it is properly made an offence to insult a private person going about his own business, a fortiori it ought to be made an offence to insult a public servant while he is in the discharge of his public functions, as it is by Clause 179, and still more to insult a public servant while he is holding a Court of Justice as by Clause 197. We would provide distinctly for the offence of causing interruption to a public servant in the discharge of his public functions as proposed by Colonel Sleeman, subjecting the offender to a fine not exceeding 200 Rupees, and of course to imprisonment in default of payment under the general rule. We shall propose a similar arrangement with respect to the offences described in Clause 197.

117. Mr. Hudleston objects to Clause 181, which provides for the punishment of a person who, knowing himself to be directed by law to give assistance to any public servant in the execution of his public duty, intentionally omits to give such assistance, with imprisonment which may extend to 1 month, or fine to the amount of 200 Rupees, or both.

This provision appears to him calculated to lead to much abuse, and he thinks the principle of doubtful propriety and the penalty too severe. His Colleague Mr. A. D. Campbell, expresses his dissent from this opinion, and we agree with him. The Digest of the English Criminal Law has a general article under which a person wilfully doing what is prohibited, or " omitting any matter or thing commanded to be done by " any Statute" is punishable with imprisonment which may extend to 3 months, or fine at discretion, or both. The Commissioners observe that this is " an enactment which is essential for the enforcing of general laws in the absence of any particular penalties annexed to disobedience." The penalties, they observe, may be incurred although the offender is not apprised by the Digest by what acts or omissions he will incur them. This, they admit, is an inconvenience, but a necessary one, for some means are absolutely essential for compelling obedience to the direct and peremptory precepts of the law, and one who is wilfully guilty of disobedience may be regarded as having acted criminally. These observations appear to be applicable to the provision in Clause 181.

Chap. IV. Sec 2, Art. 12.

7th Report p. 11.

118. We come now to Clause 182, the reasons of which are fully explained in the Note to this Chapter. What is proposed " is to " empower the local authorities to forbid acts which those authorities " consider as dangerous to the public tranquillity, health, safety, or " convenience, and to make it an offence in a person to do anything " which that person knows to be so forbidden, and which may endanger " the public tranquillity, health, safety, or convenience." The Clause does " not give to the local authorities the power of arbitrarily making " any thing an offence. For unless the Court before which the person " who disobeys the order is tried shall be of opinion that he has done " something tending to endanger the public tranquillity, health, safety, or " convenience, he will be liable to no punishment. The effect of the " order will be merely to deprive the person who knowingly disobeys " the order of the plea that he had no bad intentions. He will not be " permitted to allege that if he has caused harm, or risk of harm, it " was without his knowledge."

Note F p 39—40

119. We think it is satisfactorily shewn in the note that the proper local officers should have power to issue orders for the purpose indicated, to have force without the sanction of the Legislature, so far as is provided in the Clause in question; and with such a check upon the punishment of persons disobeying the orders as the Clause contains, in requiring it to be proved that the disobedience, by act or omission, caused or tended to cause any of the evils against which the order was meant to guard, it

does not appear to us that it is liable to abuse; nor do we see that there is such room for arbitrary constructions as Mr. Norton finds in it.

120. Mr. Hudleston says, "the intention of this Clause appears "good, but I think it badly worded. Power to remove nuisances should "be given. I object to punish for causing 'any annoyance,' 'risk of "'annoyance,' or 'risk of rioting.'" Mr. Hudleston does not explain what he understands by the term "nuisance." By the definition of it in the Digest of English Criminal Law it includes any act or unlawful omission which causes or tends to cause "any public calamity, mis-"chief, or disorder, or any common injury, damage, inconvenience, or "*annoyance* to the Queen's subjects," (generally, or any class of them,) "in respect of their habitations, personal safety, health, or comfort and "convenience, or property." So that according to the English Law, which Mr. Hudleston generally approves of, in giving power to order the removal of a nuisance, and, as we apprehend Mr. Hudleston means, to enforce the order by a penalty, power would be given virtually to punish for annoyance, which he objects to.

121. It has been suggested that the authors of the Code have been over cautious against abuse of the authority which they deem to be necessary in this respect, in providing, for the reasons stated by them, "that no person should be punished merely for disobeying a local order "unless it be made to appear that the disobedience has been attended "with evil or risk of evil" intending thus to secure that no person shall be punished "for disobeying an idle or vexatious order." Mr. H. C. Tucker says, "no one should be allowed to plead that an order was "'foolish' as his reason for disobeying it; until reversed on appeal the "order of every public servant should be binding, and be enforced. "Officers should be warned against issuing vexatious orders (under "liability to suit for damages in the Civil Court) and they might be "prohibited from issuing any general orders without the previous "sanction of the controuling authority."

122. The Commissioners themselves say, "we see some objections "to the way in which we have framed this part of the law. But we are "unable to frame it better." We suppose they had some apprehension that the power they felt to be necessary would be apt to be neutralized when the punishment of disobedience to it was made contingent on the judgment of another authority as to the effect of such disobedience—that the order would not be likely to meet with the prompt obedience requisite to make it effectual for the end intended on an emergency if

disobedience could not be punished summarily by the same authority which issued the order. We have some such apprehension; but we are not prepared at present to suggest any modification of the Clause, which while it should make the power more effectual should leave it equally safe from abuse. We are the more content to leave the Clause untouched when we find that only one Officer employed in the internal administration has offered a practical objection to it.

123. Clause 184 provides for the punishment of a person holding out a threat of injury to a public servant to prevent him from doing his duty, and Clause 186 for the punishment of one who holds out such threat to any person to prevent him seeking protection from a public servant empowered as such to give him protection. In both cases the punishment is imprisonment of either description, which may extend to one year or fine or both. Mr. Hudleston (Mr. A. D. Campbell agreeing) objects to the former Clause as liable to great abuse. "Threats," he observes, "are often effusions of passion unattended with any formal inten-"tion of wrong." The observation is true—but it is for the Court to distinguish between empty threats of this kind for which the punishment should be merely nominal, and threats calculated to cause the person to whom they are held out to be in fear of the injury threatened, which it is proper to punish with more or less severity, within the limit prescribed, according to the nature of the injury threatened and the probable efficacy of the threat. For a threat of "grievous hurt," delivered in a manner calculated to make the person threatened believe that it would be inflicted, and terrifying him with the apprehension of it to a degree likely to induce him to fail in his public duty, the maximum punishment authorized would not be too severe; still less for a threat of murder, to which the Clause equally applies. Indeed, we cannot think it severe enough, when reference is made to Clause 483, which provides the punishment of imprisonment which may extend to two years, or fine, or both, for the offence of criminal intimidation, (Clause 482,) committed to induce *any person* to do what he is not legally bound to do, or to abstain from doing what he has a right to do, or merely to cause distress or terror to him. It is to be observed, that this Clause 184 applies to judicial officers as well as others, there being no special provision regarding threats to judicial officers in the next Chapter of Offences against public justice. We are of opinion that the penalty should be the same as is denounced in Clause 483.

124. With reference to Clause 187 and others to the same effect, Sir H. Seton questions first, generaly, the propriety of making offences cumulative; secondly, the propriety of making them so to the extent

proposed in this Chapter. Mr. Norton observes that double or cumulative punishments abound in this Chapter with less need for them than in any other. We shall consider the general question in reviewing the Chapter of Punishments. We have above suggested a reason for cumulative punishments being so frequent in this Chapter, namely, to provide discriminately for aggravations which the English Law provides for indiscriminately by allowing a much greater latitude in the punishments for the primary offences, and we cannot but think the method of the Code as it limits discretion is more conducive to exactness in the apportionment of punishment.

Paras. 108-109-113.

125. Mr. Pycroft observes that there is no adequate punishment in the Code for preferring false complaints, a very common practice in India. We conceive that Clause 163, upon which we have remarked in para. 102, sufficiently provides for this offence.

126. Sir H. Seton asks "are the offences contained in this Chapter "to be the only contempts liable to punishment? If so what is to be "the provision for enforcing decrees, orders, &c.? Is any party to be "at liberty to set the law at defiance who is willing to submit to a "limited fine and imprisonment?" We have already offered a suggestion on the point touched by the last question. To promote the enforcement of decrees, &c. there are some further provisions in the next Chapter. The penalties prescribed for the particular offences obstructive of judicial procedure which are defined in the Code must be taken as exclusive of other punishment. But it would seem not to be intended to meddle with any other coercive power the Courts possess for the enforcement of decrees, &c. as by attachment and sale of property and so forth.

Para. 104.

Clauses 193 and 194.

CHAPTER X.

OF OFFENCES AGAINST PUBLIC JUSTICE.

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127. This Chapter is intended to provide for offences that interfere with the administration of justice, which do not fall within the provisions of the preceding Chapter relating to contempts of the lawful authority of public servants, or of other Chapters, or which appear to call for more severe punishment when committed for the defeat of justice.

Clauses 188 to 192.

128. The first five Clauses in this Chapter which relate to false evidence are very important. The first of them, Clause 188, defines the offence of "giving false evidence" on oath or under a sanction tantamount to an oath, distinguishing it from the offence of making a false statement to a public servant under the like sanction in Clause 162, by the circumstance that it is given in some stage of a judicial proceeding touching a point material to the result of such proceeding. The next Clause 189, defines the offence of "fabricating false evidence." Clause 190 provides for the punishment of the offence of giving or of fabricating false evidence simply; Clauses 191 and 192 aggravate the punishment when the offence is committed with the intention of deceiving a Court of Justice so as to procure a wrongful conviction of a capital offence, or of some grave offence not capital.

129. The English Criminal Law Commissioners in their 5th Report expressed an opinion "that the distinction between the offences of false "swearing in a judicial proceeding and mere false swearing is judicious "and proper." After pointing out some statutory provisions regarding "mere false swearing," they observed that the great objection to such provisions is that "they confound the aggravated offence of judicial "perjury with the inferior crime of false swearing." "It appears to us," they said, "that the object of the law may be much more effectually "attained by a general Clause, such as will be found in the Digest, "making it criminal in any person lawfully required by any competent "authority to declare the truth upon his oath in any proceeding not "judicial, wilfully to state a falsehood, and we propose to place this "offence in a lower degree than judicial perjury in the classification of "punishments." This is exactly the course taken by the Indian Law

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Commissioners in framing the Code. We find however that the English Criminal Law Commissioners took a different view in framing the Digest appended to their 7th Report. In this the Article defining perjury includes false swearing on any " other occasion where an oath is imposed, " required or sanctioned by law," as well as " in some judicial proceed- " ing." We think the arrangement of the Code is preferable for the reasons given in the 5th Report, as above cited.

Chap V, Sec. 4, Art 5

130. Mr. Hudleston commenting on Clause 188 says, " I do not " see why the word ' perjury' which is perfectly intelligible to the people " of India, and has been so long in use, is discarded." Mr. A. D. Campbell answers, " The reason why the word ' perjury' as well as the " English Law regarding it has been entirely discarded in this Code, has " been most satisfactorily explained in Note G." He adds, " it is grati- " fying to find so many Officers in the interior bearing testimony of that " admiration which I agree with them is justly due to the Law Commis- " sion for the vast improvement they have suggested in this important " branch of the Criminal Code." The authors of the Code thought it inexpedient to use the technical terms of the English Law where they did not adopt its definitions, and so materially departed from it in substance. The reason is general, and applies to the whole body of the Code, as well as to this particular article of it. As to the people of India, although the word " perjury" is used in the English Regulations, we apprehend that the offence is better known to the generality by words of similar import to those used in the Code " expressing the " nature of the crime in the most current local language."

Bengal Regn II 1807, Sec 3, Clause 1
Corresponding with Madras Regn VI 1811, Sec. 3, Clause 1.

131. There are " *explanations*" annexed to Clause 188 which, for the purpose of it, include as judicial proceedings certain investigations for judicial objects which do not take place before a Judge or a Court of Justice, as those terms are defined in Clauses 12 and 13. Mr. Hudleston questions the propriety of empowering such an Officer as is indicated in one of the " illustrations," viz. an Officer deputed by a Court to ascertain boundaries, to take evidence on oath, but we do not see any valid objection to it. The offence is the same essentially whether the oath be taken before the Judge or the officer, the intent being " to mislead the Judge " on a point material to the question" before him, in order to the decision of which the investigation is directed to be made. It is to be observed that another explanation makes an Interpreter who gives a false interpretation on oath to a Court of Justice guilty of " giving false evidence" within the meaning of this Clause.

(c)

132. It will of course be necessary to modify the wording of Clause 188 and of Clause 162, so as to make them consistent with Act V.

of 1840 and Act XXI. of 1837, in respect to the affirmation substituted for an oath in judicial proceedings by the former, and to the declaration allowed to be substituted for an oath on other occasions by the latter. The punishment authorized by Section IV, Act XXI. of 1837 for a false declaration is less than is authorized for a false statement on oath by Clause 162. The latter we think should not be altered.

Imprisonment not exceeding 1 year, or fine, or both.

Imprisonment not exceeding 3 years, or fine, or both.

133. Mr. Fagan proposes an additional provision for the case of a person "stating that to be true, which he could not possibly know to be "true, or stating his belief in the truth of a fact touching any point "material, &c. which he knows to be false or in the truth of which "he could not possibly have any belief." The Digest of the English Criminal Law declares a person guilty of perjury who "swears affirmatively or negatively as to some fact or thing, &c., knowing that which "he swears to be false or *not knowing it to be true*." We think it is worthy of consideration whether words similar to those in italics should not be introduced into Clause 188, making it "false evidence" when a person "states that to be true which he does not know to be true," as well as when he "states that to be true which he knows to be false" according to the present definition. According to Mr. Livingstone's Code, perjury is a *falsehood* asserted under the sanction of an oath, &c. it being explained that "falsehood in this definition refers to the belief of the "party attesting," by which explanation the party would be guilty of the offence, if, although he did not know what he stated as true to be false positively, he stated it to be true when he did not know, and therefore could not believe it to be true. "The Prussian Code, (it appears,) "affixes the punishment of perjury 'to any person who upon his oath "'denies his knowledge of any matter or occurrence with which he is in "'truth acquainted.' The same law also inflicts a penalty upon persons "who from thoughtlessness and want of care, swear falsely to facts of "the true state of which they might and ought to have been acquainted." If the alteration here suggested should be made in Clause 188, it would be proper to make it also in Clause 162.

Chapter V S 4, Art 5.

Note (x) p 51—5th Report of Commissioners on Criminal Law.

134. Mr. Greenhill observes—"a plaintiff who voluntarily takes "oath to the truth of his claim, might come under the definition in "Clause 188, although by the Note it does not appear to be intended. "By the Bombay Code, a plaintiff is in such a case liable to the punish-"ment of perjury, and an instance of its infliction has occurred."

135. It is clear, we think, that this Clause is applicable to a plaintiff taking an oath to the truth of a claim which he knows to be false, under any system of civil procedure which permits such an oath to be

Regn IV 1827, Sec 22, Clause 2
Bengal IV. 1793, Sec. 6
XXIII 1814, Sec 28.
Madras III 1802, Sec. 8.
VI. 1816, Sec. 27.

taken, as that of Bombay does, and as do also the Regulations of Bengal and Madras on the consent of the parties. The Note which appears to be referred to by Mr. Greenhill, relates to the assertion of falsehoods in pleading, not on oath.

p. 41.

136. The observations in Note G. in support of the provision contained in Clauses 189 and 190 regarding the offence of "fabricating false evidence," are quoted with approbation in the 5th Report of the Commissioners on the English Criminal Law. And in the Digest annexed to that Report, under the head of offences against the administration of justice, there is an article on the subject in the following terms: "Whosoever shall fraudulently and deceitfully *cause any* fact or *circum-* "*stance to exist*, in order that such fact or circumstance may afterwards "be proved in evidence against any other person, with intent to procure "such other person to be unjustly charged or convicted of any offence, "shall incur the penalties of the ——— class." The words here printed in italics appear to have been adopted from the Penal Code, and so far as the article goes it agrees with Clause 189 of the Code, but the latter is more comprehensive, applying to a civil judicial proceeding as well as to a criminal one, to which the above article is confined, and to cases in which the essence of the offence may be the deceit put upon the Court without any intention of injustice to another, as in the illustration (*c*). In the General Digest submitted with the 7th Report of the English Criminal Law Commissioners, the corresponding article is altered in terms, but it would seem to be intended to have the same effect.

p. 26.

Art 119, p 62.

Sec 5, Art. 26, p 169

137. Mr. Hudleston observes of the definition in Clause 189, the leading words of which, as we have remarked, are introduced into the article just quoted, that it appears to him "an instance of a definition not "intelligible in itself made so by illustration." He is not supported in this criticism by any other officer, and it appears to us unfounded.

138. Mr. Norton says,—"I agree in the expediency of the Clauses "against '*fabricating* false evidence,' and its logical distinction from "giving false evidence."

139. By an "*exception*" under Clause 190, it is declared that "a "person who fabricates false evidence intending thereby to save himself "from conviction for an offence, and not intending nor knowing it to be "likely that the false evidence so fabricated may cause any injury to "any other party, is not within the penal provision of this Clause." This exception the Commissioners consider to be in strict conformity with the principle of their rule. "We propose to treat the giving of

Note p 42

" false evidence and the fabricating of false evidence in exactly the same " way. We have no punishment for false evidence given by a person " when on his trial for an offence, though we conceive that such a " person ought to be interrogated." " As we do not propose to punish " a prisoner for lying at the bar in order to escape punishment, so we do " not propose to punish him for fabricating evidence with the view of " escaping punishment, unless he also contemplated some injury to others " as likely to be produced by the evidence so fabricated. If A stabs Z, " and afterwards on his trial denies that he stabbed Z, we do not propose " to punish A as a giver of false evidence. And on the same principle if " A, after having stabbed Z, in order to escape detection, disposes Z's body " in such a manner as is likely to lead a jury to think the death accidental, " we do not propose to punish A as a fabricator of false evidence."

140. Sir H. Seton questions the propriety of this exception. " Why," he asks, " should a just punishment be evaded by fabricated " evidence any more than a just demand. The English Law (practically " at least) treats a defence supported by perjury as an aggravation of " the offence. Why depart from so sound a principle and surrender all " the moral considerations so forcibly insisted on in the Note?" Sir R. Comyn objects to the exception " unless the word ' fabricates' be meant " to be restricted to such acts of the party himself as are indicated by " the illustration (*a*)." " Fabricating evidence," he observes, " may " include the procuring of other men's false testimony, and a party who " evades conviction by such a proceeding, ought not to escape from the " consequence of one crime by the successful commission of another." Mr. Pyne says—" The very recognizing the right of fabricating false " evidence seems to be holding out somewhat an encouragement to it. " The right of pleading not guilty can never be denied to a prisoner, nor " exception be taken at a negative declaration, but when in aid and " support of his denial another substantive offence is committed, I " cannot think it should have the sanction of the law in support of it."

141. To Sir Henry Seton's question, Why should a just punishment be evaded by fabricated evidence any more than a just demand? we answer, that the evasion of a just demand is an injury to the plaintiff, and the temptation to cause that injury is like the temptation to commit any other crime lucri causâ. But the temptation to escape from death or infamy though deserved, by means of a fraud which injures no individual, is greater than the weakness of human nature can in general resist. To punish a man for doing so would be to punish the want of heroic devotion. " Ignoscendum enim ei," say the Civilians, " qui sanguinem " suum qualiter qualiter redemptum voluit."

142. We do not agree with Sir R. Comyn, that "the procur-
"ing of other men's false testimony" can be considered as "causing a
circumstance to exist" within the meaning of Clause 189. It is
abetment of the offence of giving false evidence, and is punishable
under Clause 88, notwithstanding the "*exception*" to Clause 190. It does
not appear to us that any act to which the exception applies can properly
be called the commission of *a crime*, seeing that to fall within the
exception it must be done "not intending or knowing it to be likely"
that it "may cause any injury to any other party." The kind of acts
intended, is indicated in the illustration (*a*) subjoined to the exception,
and in that given in the Note as quoted above, namely, acts harmless
in themselves, but which being done with the intention of misleading a
Court of Justice fall within the definition of "fabricating false evidence."
We can hardly think that any of the objectors to this exception would
deem it right to punish a person who "to save himself from conviction
"for an offence" did what is supposed to be done in the illustration (*a*),
or in that referred to in the Note, intending that it might appear in
evidence in his favor when he came to trial, any more than to punish
him for a false assertion made by him in his defence.

Note G p 42. 143. The authors of the Code say—"The giving of false evidence
"must always be a grave offence. But few points in penal legislation
"seem to us clearer than that the law ought to make a distinction
"between that kind of false evidence which produces great evils and
"that kind of false evidence which produces comparatively slight evils."
Clause 190. "As the ordinary punishment of false evidence, we propose imprisonment
"for a term of not more than seven years nor less than one year. If the
"false evidence is given or fabricated with intent to cause a person to
"be convicted of a grave offence not capital, we propose that the person
"who gives or fabricates such evidence may be punished with the
192 "punishment of the offence which he has attempted to fix on another.
"If the false evidence be given or fabricated with the intention of
"causing death, we propose to punish it in the same manner in which
"we propose to punish the worst attempts to murder," that is, with
191. transportation for life, or rigorous imprisonment which may extend to
life, and must not be less than seven years, and with fine at discretion.

5th Report, p 27 144. On this subject in their 5th Report, the English Criminal Law
Commissioners say—"We think it a question worthy of great consideration
"whether the crime of perjury ought not to be marked by some grada-
"tions. It is strongly remarked by the Indian Law Commissioners that
"'the English Law makes no distinction whatever between the man who
"'has attempted to take away his neighbour's life by false swearing and

" ' the man who has strained his conscience to give an undeserved good
" ' character to a boy accused of petty theft; the former is punished far
" ' too leniently, the latter perhaps too severely.' We shall recur to
" these considerations when we have occasion to suggest the different
" classes of punishments." Accordingly in the Digest submitted with
their 7th Report, there is an article providing for the punishment of a Chap. V., Sec. 4, Art. 14.
person who by perjury or subornation of perjury procures or endeavors
to procure the conviction of another of a capital offence, and a further Art. 15.
article for the punishment of one so procuring or endeavoring to procure conviction of a transportable offence. The penalties under the
former of these articles are transportation for life, or for any term not 7th Class.
less than seven years, or imprisonment for any term not exceeding three
years; under the latter transportation for a term not exceeding fifteen 12th Class.
years, nor less than seven years, or imprisonment not exceeding three
years.

145. Upon the provisions of the Code on the subject of false evidence, Mr. J. F. Thomas says—" The modification of the previous Law
" proposed in the Code, by which perjury is dealt with on its own
" merits, and which annexes even transportation for life to certain
" grades of the offence, is a great and valuable improvement in principle.
" But it does not appear to me, that the principle is carried by any
" means far enough in the descending scale."

" The crime appears still to be viewed with English eyes, and visit-
" ed accordingly with heavy penalties, though in the Notes (page 41,)
" it is acknowledged, that direct perjury does little harm in India,
" compared with what may be effected by it in England. It is not
" apparently sufficiently borne in mind, that we have no oath by which
" we can bind the conscience of the Hindoo. He does no violation
" therefore to his conscience, in forswearing himself; and he neither
" does nor can he perceive, and feel with us the enormity of perjury.
" By this Clause (190) the heavy penalty of the old Law, is in a great
" measure retained, (with the very valuable addition of fine,) whether
" the perjury has been committed in the *most trivial*, or, in a very
" important case; and the natural and necessary consequence is, that the
" convictions will always be extremely limited, and the prosecutions, as
" heretofore, few; perjury, therefore, it may be predicted, will continue
" unabated, under a Code, which annexes these high penalties."

" The interest of the community would, I conceive, be better served
" by lowering the penalty of the offence, and enjoining frequent prose-
" cutions. A beneficial result, has, I believe, always followed, whenever

" this experiment has been tried. Captain Pottinger states, that he had " by this means so completely repressed the offence, ' that he did not " ' recollect a single instance of perjury having occurred before him in " ' six months.' Judicial Selections, vol. IV. page 451."

Chapter V. Sec. 4, Art 4.

10th Class.

146. Mr. Thomas's argument we think is valid against the minimum prescribed in Clause 190. By the Digest of the English Criminal Law the punishment for perjury, without the aggravations separately provided for as above, is transportation for the term of seven years, or imprisonment not exceeding three years, or fine at discretion, or both. Here when imprisonment is the punishment to be inflicted, the discretion of the Judge is not limited by a minimum term, and we would recommend that the above Clause be modified so as to make it agree on this point with the corresponding article in the Digest. We would omit the minimum likewise in Clause 162.

p. 258 to 266 and p. 666.

147. In our former Report we have recommended that Clause 191 should be declared applicable generally to the offence of giving false evidence with the intention of causing a person to be convicted of a capital crime, as well when the object intended is effected, as when it is not, rather than that when the object is effected the offender should be dealt with as guilty of homicide, as intended by the authors of the Code. In Clause 192 it appears to be necessary to introduce after the words " punishable with" the words " transportation for life, or" to make the Clause agree with the illustration, and to express what is obviously intended.

148. Mr. Thomas observes that the Code does not include the offences provided for by the Madras Regulations I. of 1832, and XIII. of 1832, Section 7,—" the first punishing false allegations in petitions to the " Judicial Courts; the other, prevarication or other gross contempt of " Court." These provisions he considers " of great *practical* importance. " They confer upon the Courts a power essentially necessary in the " present state of society, to check the attempts hourly made to impede " the due administration of justice, and whatever may be the objections " to them on general principles, they are, I am satisfied from experience, " necessary, and peculiarly well adapted to the exigencies and circum- " stances of South India."

149. Mr. Strange says—" It is remarked in p. 44 of the Notes, that " ' The law on the subject of false evidence will render unnecessary any " ' law for punishing the frivolous and vexatious preferring of criminal " ' charges.' This ought undoubtedly to be the result of a penal provi-

" sion against perjury, but so much is the law now in force cramped by " restrictive rules inessential to the determining whether the evidence " which is the subject of the charge be false or true, that the degree of " proof upon which a suitor may be punished for a false suit, or a com- " plainant before the Police for a false complaint under (Madras) Regu- " lation IX. of 1832, would be considered wholly insufficient to lead to " a conviction of perjury or subornation of perjury."

150. Mr. Strange notices two points as requiring full and careful illustration, observing at the same time that they are perhaps more " connected with the Code of Procedure than with the Penal Code," viz. 1st, " What constitutes a question material to the result of a judicial " proceeding. 2d, What is to be considered sufficient evidence of the " falsehood stated." The first of these points only appears to require attention in this place with reference to Mr. Strange's remarks, and the suggestion founded on them. His remarks are as follows:—" A prisoner " pleads that the prosecution brought against him is the result of a " conspiracy, and wishes to expose the fact that the witnesses are related " to the prosecutor. At his instance the witnesses would assuredly be " questioned on the subject of the relationship, but if they gave false " answers it is very doubtful whether an indictment for perjury could " be maintained against them, under the existing system, although their " depositions were calculated to defeat the prisoner's plea and therefore " to affect the issue of the trial." To remedy the supposed defect, he suggests that " the giving a false statement under an oath, or a declara- " tion substituted for an oath, in relation to any fact connected (in any " way) with the merits of any matter undergoing judicial investigation, " with intent to deceive, should be considered to constitute the crime of " perjury."

151. We do not think there is room for the doubt expressed by Mr. Strange upon the case here put. If the false depositions " were " calculated to defeat the prisoner's plea, and therefore to affect the issue " of the trial" as he avers, we conceive that there would be sufficient ground for an indictment of perjury both under the law of England and under the law at present observed by the Company's Courts, and that an indictment would be sustainable equally under Clause 188 of the Code. As to English law, Russell says, " if the false oath has *any tendency* to " prove or disprove the matter in issue, though but circumstantially; as " if the party wilfully mistake the colour of a man's coat or speak to the " credit of another witness, it will amount to perjury." This we apprehend holds good equally as applied to the definition of false evidence in the Clause under consideration. It appears to us that with the

Russell 2, p 541.

"*explanation*" on the point in question annexed to the Clause, the definition is as comprehensive as it ought to be. It will be an important object in framing rules of procedure applicable to the penal provisions on this subject, to take care that they are not frustrated by unnecessary restrictions as to proof.

152. With respect to false allegations in petitions to the Judicial Courts, Clause 163 will suffice for their punishment if they are not supported by false swearing, when they are so supported Clause 188 becomes applicable. It does not appear therefore that any further provision is requisite on this head.

153. But we are inclined to concur with Mr. Thomas in thinking it advisable to introduce into the Code a provision for the punishment of prevarication, which when committed before a Court of Criminal Jurisdiction is now punishable, under Clause 7, Regulation XIII. of 1832 of the Madras Code, with a fine not exceeding 50 Rupees, commutable, if not paid, to imprisonment not exceeding one month. We have noticed above on the authority of the English Criminal Law Commissioners, that the Prussian Code "inflicts a penalty upon persons who from thought-"lessness and want of care swear falsely to facts, of the true state of "which they might and ought to have been acquainted." We are disposed to think that a Clause for the punishment of persons who being on oath, &c., in any judicial proceeding, shall prevaricate or make contradictory or inconsistent averments in a manner indicating a deliberate intention to conceal the truth, would have a very salutary effect. The punishment we would recommend is imprisonment of either description for a term which may extend to six months, or fine, or both.

154. By Regulation III. of 1826 of the Madras Code, a person wilfully and deliberately giving two contradictory depositions on oath is liable to be convicted of perjury, and to suffer the punishment prescribed for that offence. It has been decided that under the law of England "perjury cannot be legally charged and assigned by shewing that the "defendant did on two different occasions make certain depositions "contradictory to each other, with an averment that each of them was "made knowingly and deliberately, but without averring or shewing in "which of the two depositions the falsehood consisted;" and we apprehend that under similar circumstances the offence of giving false evidence could not be so charged under Clause 188. We are strongly of opinion that "whoever in any stage of a judicial proceeding being bound by an "oath or by a sanction tantamount to an oath, to state the truth, gives "a statement touching any point material to the result of such proceed-

Russell 2, p. 542

" ing, which directly and positively contradicts a statement touching the " same point, given by him on oath, or under a sanction tantamount to " an oath, in any stage of a judicial proceeding, at another time," should (failing any satisfactory explanation of the contradiction to negative the inference of a corrupt intention) be liable to punishment. Under such circumstances it is morally certain that the party has given a false statement on one or other of the two occasions, though it may be impossible to shew positively which of the contradictory statements is false. Both statements may perhaps be false, but one only can be true. It is possible indeed that the first statement may have been false through an error or mistake which has been corrected by subsequent information, and that the second contradicts the first, because it contains the truth which had come to the knowledge of the party in the meantime. But when there is no such allegation, nor any explanation of the contradiction to negative the inference that the party at one time or the other has been guilty of stating on oath (or as it may be) as true what he knew to be false in order to deceive a Court of Justice, on a point material to the question to be decided by the Court, we think the law should be so framed that he should not be able to escape from the punishment he would well deserve. In the case in question, we do not see why the party who has given the contradictory statements might not be charged with the offence of false evidence upon each of them successively, first upon that which from the circumstances there is reason to think is most probably the false one, giving the other in evidence against him, which would throw upon him the onus of proving it to be false, and if he succeeded in defending himself against that charge by means of such proof, then upon that other statement as proved to be false by the evidence he had himself adduced. By this mode of proceeding a really guilty person could hardly escape. And a person who had such a defence as before supposed, being able to shew, for instance, that his second statement differed from the first because he had ascertained in the meantime that the first statement was incorrect, would have an opportunity of clearing himself by giving proof to that effect. If necessary a special rule might be enacted to sanction this mode of procedure.

155. Mr. Norton makes the following remarks upon Clauses 193, 194, and 196. " I conceive that Clauses 193, 194, making it 'crimi- " nal to ' *conceal*,' or claim with a knowledge of ' having no *rightful* " ' claim,' property—for the purpose of preventing its seizure for a fine, " are scarcely calculated for *fair* application from the uncertainty of the " cases falling within such terms. But they are open at the same time " to great abuse, by *unfair* application. The principle seems borrowed " from the Bankrupt and Insolvent Laws—but I think there is much

" difference in the duty of Bankrupts to *disclose* and surrender, and the " *obligations* of culprits to *submit* to a sentence to be *enforced* by others. " The making it criminal to sue *without probable cause* (which is the effect " of Clause 196) labours under the same objection, and I conceive it very " inexpedient to punish such conduct as a *crime*, and particularly by so " severe a possible punishment as one year's imprisonment."

156. Sir H. Seton also questions " the making a wrongful claim " to property a criminal offence" as in Clause 194. Again, he asks " whether the consequence of such an enactment" as is contained in Clause 196, " would not be that every unsuccessful civil suit might be " connected with a criminal prosecution" ? and " whether costs are not a " sufficient preventive" of the evil which the Clause is intended to provide against, " or might not be made so ?"

157. On the other hand, the Company's Judges and Officers who have noticed these Clauses approve of them in principle, that is they think it proper that the acts described therein should be dealt with as offences, though they do not entirely agree to the provisions proposed.

158. Mr. J. F. Thomas referring to those parts of Clauses 193 and 194 which relate to civil cases, observes that they " provide only a " penalty where the fraudulent claim is set up to prevent property being " taken in execution of a *decree* of a Court of Justice." He says, " I see " no reason for confining the rule to decrees—the Clause should provide " alike, for cases where property is taken in execution of a decree, or, " *in pursuance of any order of a Court of Justice.* In cases, where " orders are issued on motions, not on decrees, for taking property into " the possession of the Court, parties who may prevent the due execu- " tion of such orders by wrongful claims, or deceptious practices, impede " the due administration of justice, as much as those who so act after a " decree has been passed. It is advisable, I think, that provision should be " made for the one class of cases, as for the other." Mr. A. D. Campbell supports this suggestion, while Mr. Hudleston objects to it.

159. Of Clause 196 Mr. J. F. Thomas says—"This Clause is of " the first importance to the due administration of civil justice, in the " present state of society in South India. But to be effective, it must " be enlarged. It was an evil of frequent occurrence in Tanjore, for " parties to introduce into *just* suits as regards the chief litigant, the " names of parties, as defendants, and even as co-plaintiffs, who had no " concern in the suit, placing all their property for the time being in " litigation, greatly to their detriment, and annoyance. This case does

" not appear to be provided for by the rule. Neither does this Clause " provide for those cases in which the suit is wholly fictitious, not insti- " tuted for the purposes of annoyance."

" In Tanjore, for instance, it is not unfrequent, for an individual " possessing landed property, on entering into partnership in trade, to " set up some dependant, or a near relative, to institute a suit for the " whole of his property. The claim of the plaintiff is admitted by the " proprietor, the defendant in these fictitious suits. No one at the time, " is either injured or annoyed. It is only in the course of years, when " unsuccessful in his speculations, and at the time his creditors press " their claims against him, that the original plaintiff, the man of straw, " appears, not with a naked claim, but with a decree in his favor, adjudg- " ing him the whole of the defendant's property. This property, he will " acknowledge, he has nevertheless left the whole time in the defendant's " possession; but he pleads his right under a decree of Court."

" To put down this, and similar abusive use of the Courts of Justice, " I would strongly recommend, that the Clause should be so framed, as " to include all cases of fictitious and fraudulent litigation. It might run " thus—'Whoever fraudulently institutes, *or becomes a party* to any fictiti- " ' ous suit whatever, shall be, &c.' as in Clause 196, or thus, ' Whoever " ' for the purposes of annoyance, or fraud, institutes, *or wilfully becomes* " ' *a party to any suit*, knowing that there is no just ground for such " ' suit, shall be punished with imprisonment, &c.' as in the Clause."

" To the explanation I would add a Note that ' although a suit may " ' be just as respects some of the parties, yet, if it is clearly fraudulent " ' in regard to others—it may be dealt with as fraudulent.' "

160. Mr. A. D. Campbell says, " I have been Principal Collector " in Tanjore where Mr. Thomas was Zillah Judge, and I think the " extension of the Clause proposed by him of vital importance, not only " to check evil in Tanjore, but to impede its progress into other districts. " In the Law of Procedure this should be made a criminal offence, " summarily cognizable by the Civil Court in which the suit is filed.

161. Of Clause 196, Mr. G. W. Bacon says, " This is much to be " admired. I would give the power of punishing to the Civil Judge, " but limit the fine because it is a species of contempt. I also entirely " concur (he adds) in the remarks on the subject of false pleading in " the Notes p. 43-44. The punishment for this offence, for offence " undoubtedly it is, is perhaps more necessary in this country where " there is so much falsehood."

Imprisonment which may extend to one year or fine, or both.

162. We are of opinion that the acts, described in Clauses 193 and 194, are properly considered as offences against public justice and fit subjects for punishment, and we think that the penalties are suitable, except that we would substitute "simple imprisonment for imprisonment of *either* description." Mr. Norton supposes that the principle is borrowed from the Bankrupt and Insolvent Laws, and he appears not to object to it in cases to which they apply. But if it be a right principle in such cases, we cannot see why it should not be right to follow it where the object is to enforce the process of the Courts for the recovery of property in *civil suits*. Indeed Mr. Norton does not suggest that there is any difference here. But he thinks there is much difference in the duty of Bankrupts to disclose and surrender, and the obligation of culprits to submit to a sentence to be enforced by others. But if, as we presume, Mr. Norton will allow that it is an offence against justice in a culprit to escape from custody in order to avoid execution of a sentence of imprisonment, and an offence to harbour or assist him, and that such offences are fit subjects of punishment, we think he ought to allow upon the same grounds that the removal or concealment of property, or any dealing with it in order to prevent the execution of a sentence, of fine, for example, instead of imprisonment, is an offence against justice and a fit subject of punishment.

163. In considering Sir H. Seton's question upon Clause 194 as to the propriety of "making a wrongful claim to property a criminal offence," it is to be observed that it is not a wrongful claim simply that is punishable, but a wrongful claim made with the intention to defeat the process of a Court of Justice, which intention it is that brings it within the scope of the Penal Law

p 43-44

164. In order to judge aright of the provision contained in Clause 196, it is necessary to advert to the observations upon false pleading in the Note to this Chapter. For the reasons there forcibly stated, the Commissioners came to the conclusion that "a law for punishing false "pleading is indispensably necessary to the expeditious and satisfactory "administration of justice," and they only refrained from proposing such a law "because while the system of pleading remains unaltered in "the Courts of this country, and particularly in the Courts established "by Royal Charter, it will be difficult, or, to speak more properly, "impossible, to enforce such a law." Therefore they went "no further "than to provide a punishment for the frivolous and vexatious institut-"ing of civil suits, a practice which, even while the existing system of "procedure remains unaltered, may without any inconvenience, be made "an offence."

165. The English Criminal Law Commissioners in their 5th Report recite a provision against deceitful practices by advocates and others, which was made in the 3d year of the reign of King Edward I: and though they appear to be on the whole adverse to any penal enactment on the subject, in regard to advocates at least, they say, "it "cannot however be doubted that the practice of special pleading is so "unlimited and unrestricted as to be the subject of much abuse, and to "afford a wide field for the practice of chicanery, and the causing of "useless expense, vexation, and delay;" they then "subjoin some of the "observations made by the Indian Law Commissioners on this subject, "as entitled to general attention."

p 27.

Note p. 28.

166. We cannot agree with Mr. Norton that the effect of Clause 196 is to make it criminal to sue *without probable cause*, merely, nor with Sir H. Seton that the consequence of such a provision would be that every unsuccessful civil suit might be connected with a criminal prosecution; for it is expressly laid down that the suit must have been instituted "*fraudulently or for the purpose of annoyance*" to warrant a criminal prosecution against the suitor. Nor could costs be made a sufficient preventive of the evil which the Clause is intended to provide against, as suggested by Sir H. Seton, for it is explained, that "it is not "necessary that the party to whom the offender intends to cause "wrongful loss or annoyance should be the party against whom the suit "is instituted," and a case is given by way of illustration, in which it is obvious that the proposed remedy would be inapplicable. In that case the offender by the supposition has secured success in his suit, and the wrong supposed to be intended to a party not included in the suit is expected to flow from that success.

167. The Indian Law Commissioners have always entertained the opinion that much may be done in the way suggested by Sir H. Seton for the repression of vexatious litigation, and in a Report addressed to Government on the 9th November 1838, certain suggestions were offered with this view, which afterwards met with the approval of the Court of Directors. The plan was, that after the determination of a suit a fee should be levied on the losing party, proportioned, when payable by the plaintiff, to the amount claimed, when payable by the defendant, to the amount decreed, the Judge being allowed to remit the fee upon special cause shewn, and that the power of inflicting a fine, *that is punishment properly so called*, should be held in reserve for flagrant cases of malice and falsehood. The fee it was observed might be regarded partly as a compensation to the State for having wasted the time of its judicial functionaries, and partly as a means of discouraging suits which, though not tainted with bad faith,

From Indian Law Commissioners to the President of the Council of India, 9th November 1838.

From Court of Directors. No. 22, 27th May 1840.

are open to the more venial imputation of temerity; while the fine was to be viewed entirely in the light of a punishment for an offence against justice, to be inflicted for such offence committed at any period of the suit, and whether the party committing it were ultimately successful or unsuccessful. The same principle has since been sanctioned by the Government of India in the Act for establishing a subordinate Civil Court at Calcutta, which has been read a first time.

168. The provision contained in Clause 196 is intended to include cases beyond the scope of the rule here adverted to, which had respect only to the parties in the suit, and was intended to be applied immediately at the termination of the suit, whereas the said Clause, as appears by the explanation and illustration annexed to it, may be brought into operation after the termination of the suit, at the instance of one who was not a party to the suit, and not within the knowledge of the Court while it was pending, for wrong which has arisen to him from the deceit put upon the Court in that suit.

169. It is proper we think that such an offence against justice as is described in Clause 196 should have place in the Penal Code. It is a matter to be settled in framing rules of procedure by what authority the offence is to be tried and the penalty adjudged. We see no reason why the cognizance of the offence should be reserved to the Court in which the suit was instituted, when that suit shall have been previously determined, although there might be convenience in authorizing the said Court to inflict the penalty when the offence is proved in the course of the proceedings before it.

170. It is not an innovation in India to punish a person who has brought a suit for the purpose of annoyance. The Regulations in force in the Company's Courts authorize the Judge when a suit shall appear to him "frivolous, *vexatious*, or groundless," to fine the plaintiff, and to commit him to close custody till he pays the fine. The rule in Clause 196 is more strict, as it does not authorize the imposition of a penalty when the suit is merely frivolous or groundless, but where it has been instituted "fraudulently or for the purpose of annoyance." What is new is the extension imported by the "*explanation*" annexed to the Clause.

Bengal Reg III. 1793, Sec 12.
Madras Reg. II. 1802, Sec 9.
Bombay Reg. IV. 1827, Sec. 54.

171. Reverting to the instances of abuse of the process of the Courts mentioned by Mr. Thomas, we have to observe that Clause 196 as it stands, appears to cover some of them, as the introducing "into "*just* suits *as regards the chief litigants*, the names of parties as defen-

"dants who have no concern in the suit," "greatly to their detriment "and annoyance." The introducing of parties not concerned, as co-plaintiffs against their will, is a proceeding we never heard of, and we are at a loss to conceive how it can take place with proper strictness in the admission of suits, without at least the party committing some other offence to bring him within the cognizance of the penal law. A fictitious suit such as Mr. Thomas describes for the purpose of securing the property of the defendant by anticipation against future creditors, that is against persons to whom he may in the course of business become indebted, can hardly be considered a fit subject of punishment either as respects the fictitious plaintiff or the defendant. Such a suit, however, brought for the purpose of defeating existing creditors of the defendant, we apprehend, would bring the plaintiff within the scope of Clause 196. We are not prepared to recommend the extension proposed by Mr. Thomas in order to make it include the defendant. But where the defendant is the instigator of the fictitious suit, as in the case supposed, he would be amenable under the law of abetment.

172. Many persons have asked what sort of declaration it is that is contemplated in Clause 195. We presume that declarations of the nature of certificates are intended, such for instance as are mentioned by Blackstone under the head of trial by certificate "allowed in such cases "where the evidence of the person certifying is the only proper criterion "of the point in dispute;" such again as the certificate of a former conviction of felony, by the Clerk of the Court where the offender was convicted, which is to be taken on the face of it as sufficient evidence of the first conviction. (Statute 9, Geo. IV., Chapter 74, Section 24.)

Com. 3. p. 333.

173. The provision contained in Clause 197 is an extension of Clause 179, subjecting the offences therein defined to a severer punishment when they are committed against a Court of Justice. We need add nothing to the remark we have already made on the principle of the provision regarding insult, in commenting upon Clause 179. We propose to provide for the offence of causing disturbance in a separate Clause, as suggested by Col. Sleeman, subjecting the offender to punishment by fine to the extent of 500 Rupees.

174. Clause 201 extends the provision of Clause 175 to the escape of a person from custody in which he is detained under a sentence, the punishment being increased to imprisonment for two years as the maximum. There is no provision corresponding with that in Clause 173 for the *rescue* of a prisoner under sentence.

175. From the Note to Clause 177, which refers to the Chapter under consideration for provisions regarding "*rescue*" as well as "escape, "and harbour *after sentence*," we are inclined to think that this omission was not intentional. At any rate it appears to us proper that it should be supplied. The punishment for rescue in Clause 173 is double of that for escape in Clause 175. We would suggest that the punishment for "rescue" in the case of a prisoner under sentence be the next higher grade above that for "escape" in Clause 201, viz. imprisonment which may extend to three years, or fine, or both, with a cumulative Clause as in the case of escape.

p. 2. 176. In Note A. on the Chapter of Punishments the Commissioners say, "It will be seen that throughout the Code wherever we have made "any offence punishable by transportation we have provided that the "transportation shall be for life." Accordingly we find no provision in the Code for transportation for a term of years except in Clause 43, as a commutation for imprisonment in the case of a person who is "not both "of Asiatic birth and of Asiatic blood," and in Clause 205 for the punishment of a person sentenced to banishment returning before the expiration of the term fixed by his sentence, in which case banishment for life is to be added. Clause 203 provides for the punishment of a person transported for a term of years, *not* by way of commutation, returning before the expiration of the term, while Clause 204 provides for the punishment of a person transported under a sentence of commutation so returning. The former of these Clauses we apprehend applies to a person sentenced under Clause 205.

177. Mr. G. W. Bacon says, "I do not find any mention of return-"ing from transportation for life." The reason is, that the Law Commissioners did not think it proper to subject this offence to the penalty of death. Therefore as there is no secondary punishment higher than transportation for life it was unnecessary to mention it. The sentence of transportation for life still subsisting, the escaped convict will of course be sent back ; but the regulation of this matter belongs to procedure.

178. Clause 206 in extension of Clause 178, provides for the harbouring of persons under sentence who have escaped from custody, or have returned from transportation or banishment. The punishment is simple imprisonment which may extend to 6 months, or fine to the amount of 1,000 Rupees, or both. This penalty may be fit when the offenders to whom harbour has been given is punishable under Clause 201. But we would recommend that the maximum be doubled when the person harboured is punishable under Clauses 203, 204, or 205.

179. Clause 46 declares that the Government may remit the whole or any part of a sentence absolutely or conditionally, and Clause 207 provides for the enforcement of the original sentence when the condition of remission is violated.

180. Sir R. Comyn observes upon Clause 201 for the punishment of a convict escaping from custody, that there is no punishment for the more guilty officer permitting the escape, further than by a reference to the Chapter of Abetment. It seems to us that Clause 97 relating to abetment by aid, by which the abettor is liable to the punishment of the offence, is sufficient. The punishment under Clause 201 is imprisonment which may extend to two years, to which the officer permitting the escape of a convict would be liable as well as the escaped convict himself.

CHAPTER XI.

OF OFFENCES RELATING TO THE REVENUE.

Note H p 45.

181. In order to frame this Chapter, the Commissioners say they "went carefully through the Revenue laws of the three Presidencies, "extracted the penal clauses, analysed them, and reduced them to a "small number of general heads."

Clauses 208 to 211.

182. The first head is "Smuggling," which is defined to be importing or exporting into or from the Territories of the East India Company, or conveying property from place to place within the said Territories *in contravention of any law.*

212 to 215.
217 to 224.
225 to 227.
228.

183. Then follow provisions for punishing breaches of the laws which have been framed for the protection of the Revenue derived by Government from Opium, Salt, Spirituous Liquors, &c. Afterwards provisions for punishing breaches of the laws concerning Stamps from which the Government derives a Revenue, and of the laws relating to the Public Post. And lastly, a provision for punishing persons licensed to do any thing with respect to any article for the doing which a licence is required by law, for breach of the licence.

184. Mr. Norton describes this Chapter "as an effort to place a "vast variety of breaches of the Revenue laws under the jurisdiction of "a few short and general provisions denouncing their criminality." Generally speaking, it denounces penalties without denoting the acts by which the penalties will be incurred, further than that they are acts in contravention of some law. To know what acts will make men liable to the penalties, reference must be had to the laws relating to the Revenue derived from Customs, Opium, Salt, &c. We think there is force in the following observations of Mr. Norton on this subject. "The only just, "and only efficient course appears to me to be to make specific enactments "for specific breaches of the Revenue laws. Some may be highly "criminal—some may be better visitable by mulct. Almost all take "their character from the subject matter and peculiar circumstances."

185. Mr. Casamajor, a Judge of the Madras Presidency, makes the following remarks upon the provisions regarding smuggling. "The

" first thing that strikes one is, that the penalties are a good deal severer " than those of the Madras Regulations. The highest penalty for " smuggling in these, is confiscation of the thing smuggled, or treble duty. " For other frauds on the Customs there is fine (unlimited), and in case " the fine is not paid, imprisonment with or without hard labour accord- " ing to the rank of the culprit. Imprisonment is in no case adjudicable " as an original penalty for smuggling, or any other fraud on the Customs, " by the Madras Regulations, nor is it by the 3d and 4th of William 4th, " Chapter 53, which with a few subsequent modifications, contains " (I believe) the present law of England respecting smuggling. Con- " fiscation or fine is the punishment in every case; and no mention at " all is made of imprisonment, except in one or two cases attended with " violence. But in this Chapter we have the offence of smuggling " punishable in every case with imprisonment which may extend to three " months, or fine which may extend to an amount equal to five times the " market value of the thing smuggled added to 500 Rupees, or both, and " this too, besides confiscation (see Clause 229). I doubt the propriety " of imprisonment as an original punishment for smuggling in any but " a few very aggravated cases. The remarks upon this subject in Chap- " ter 33 of Beccaria (who evidently does not underrate the criminality " of smuggling) appear to me very much to the purpose. There is one " strong argument against making imprisonment the stated punishment " for smuggling; viz. that the offence is very frequently committed in " this country by traders upon whom imprisonment inflicts a much more " serious evil than is contemplated by the law, in the derangement of " their concerns consequent upon their personal management being " withdrawn, and loss of credit."

186. We consider these remarks to have great weight, but we shall forbear to enter upon a particular examination of the Clauses to which they apply, and of the other Clauses of this Chapter, many of which are the subject of criticism in the papers before us, being strongly of opinion that it will be better to omit them all from the Code, and to leave all transgression of the Revenue laws, which are offences purely as breaches of positive enactments for special political objects of a fiscal character, to be provided for by appropriate penalties in the laws which contain the rules, the observance of which is intended to be enforced thereby.

187. In recommending this course, it appears to us that we are only following out the principle on which the authors of the Code thought it proper to omit from the Chapter the provisions for confiscation which are to be found in the Revenue laws. Note p. 46.

188. The acts which are specified and defined in the Clauses relating to Stamps are indeed of a character which might unobjectionably give them a place in a Penal Code, but as the specific object contemplated is the protection of the Revenue derived by Government from Stamps, and the penalties appear to have been devised and determined on considerations referring to that object peculiarly, we think it advisable to omit them as well as the other Clauses.

189. Mr. Norton says of the principal offences defined in these Clauses, that " in his construction they fall distinctly within another " more serious species of criminality, namely, forgery or uttering " forgeries." We understand him as speaking of what in his construction *ought* to be comprehended under forgery—not as intimating that in his opinion those offences do fall within the definition of forgery in this Code. Possibly however the offence described in Clause 223 might be construed to fall under forgery with reference to the 4th Article of the definition in Clause 441.

CHAPTER XII.

OF OFFENCES RELATING TO COIN.

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190. Coin is defined in Clause 230 as " metal used as money, and " bearing some mark that it is issued by the authority of some Govern- " ment in order to be so used."

191. It is made an offence to counterfeit any coin. When the coin counterfeited is the Queen's, or the Company's, the punishment of the offence is aggravated. The distinction between the Queen's and Company's coin and other coin, is maintained all through the Chapter, except in Clause 236 and Clause 242, the latter relating to the wilful uttering of counterfeit coin as genuine, the former to the possession of implements or materials for counterfeiting coin. These Clauses apply indifferently to coin of all descriptions. Clause 237 makes it an offence to abet the counterfeiting of the Queen's or Company's coin *without* the Territories of the Company, a provision which is confined to those coins specially.

192. An important distinction is made in regard to the uttering of counterfeit coin, between the utterer by profession, that is one who utters false coin which when he received it he knew to be false, and the casual utterer, who having heedlessly received a counterfeit coin in the course of his business, takes advantage of the next person with whom he deals to pay it away.

193. Objections have been made to providing for offences relating to the Queen's coin in this Code, to which the following remarks extracted from Note I. appear to us to furnish a sufficient answer, as far as considerations of utility and convenience are concerned, though they may leave some technical grounds untouched. " It may perhaps be thought p. 47 " that in proposing laws for the protection of the King's coin we have " departed from the principle which we laid down in our Note on the " law of offences against the State, and that we should have acted more " consistently in leaving the British currency to the care of the British " Legislature. It appears to us, however, that the offence of coining, " though, in an arbitrary classification, it may be called by the technical " name of treason, is in substance an offence against property and trade,

"that it is an offence of very nearly the same kind with the forging of a "Bank Note, and that it would be an offence of exactly the same kind if "the Bank Note, like the Notes of the Bank of England formerly, were "in all cases legal tender, or if the coin, like the Company's Gold Mohur "at present, were not legal tender. We do not therefore conceive "that in proposing a law for punishing the counterfeiting of the King's "coin we are proposing a law which can reasonably be said to affect "any of the royal prerogatives."

194. We have no doubt of the propriety of providing for the punishment of persons counterfeiting the Queen's coin in these Territories on the ground stated, but considering that such coin can hardly be said to have currency here in the course of business, we think it questionable whether for the main object in view, the protection of the public against fraud in money dealings, it should be put on the same footing with the coin of the local Government which forms the general circulating medium. The reason of the thing seems to require that it should be put on the same footing with other coins which come casually into circulation. With this observation we leave the point for the consideration of Government.

Letter to the Governor General of India in Council, dated 28th July 1845.

195. We have had the advantage of perusing the observations of the Chief Justice of the Supreme Court at Calcutta upon the Draft Act relating to the coin, read in Council on the 26th April 1845, which is almost entirely a transcript from the Chapter under consideration.

196. The Chief Justice objects to the offence of counterfeiting coin being punishable with imprisonment only, as intended by the proposed Act, while the offence of forgery would remain punishable with transportation for life. But there will be no such disproportion in the punishment of these two species of the crimen falsi if the proposed law be passed as a part of the general Code, since the punishment for the offence of forgery also is confined to imprisonment by the Chapter of offences relating to documents. And perhaps the Chief Justice will not be opposed to this mitigation when it appears that in England the punishment of transportation is not likely to be applied in future to persons guilty of offences of this nature, and that the longest term of imprisonment to be substituted is intended to be less than the maximum authorized by the Code in respect either to the forgery of documents or counterfeiting coin.

197. Sir Laurence Peel observes that the English Law visits with the same punishment the complete and the unfinished act of counterfeit-

ing, which he considers reasonable and expedient. We concur in this opinion. The English Statute declares that the offence of counterfeiting "shall be deemed to be complete although the coin so (falsely) made or "counterfeited shall not be in a fit state to be uttered, or the counter-"feiting thereof shall not be finished or perfected." We would add an explanation to Clause 232 in corresponding words, or introduce into Clauses 232 and 233 respectively, after the word "counterfeits," the words "or performs any part of the process of counterfeiting," as in Clause 217 respecting Stamps. We observe that these words were used in this Clause of the Code as it was first printed.

2, Wm. IV, Chapter XXXIV, Section 3.

198. Sir Laurence Peel points out that while the English Statute punishes the possession of implements, &c. for counterfeiting, equally with counterfeiting, the proposed Act (Section 10) establishes a distinction, making the possessor of implements, &c., liable to imprisonment for three years, while a person counterfeiting coin is liable to imprisonment for seven years. It is to be observed that imprisonment which may extend to seven years is the punishment for counterfeiting the *Queen's or Company's* coin, and that the punishment for counterfeiting coin in general is imprisonment which may extend to three years, the same as the possessor of implements, &c. for counterfeiting coin is liable to.

Clause 236.

Clause 233

Clause 232.

199. Further, Sir Laurence Peel observes that "the 8th, 9th, and "10th Section of the Draft Act are too limited. The 8th and 9th apply "to the making one only of many instruments for coining and to the "maker only. The English Statute is more extensive, and embraces the "mending as well as making and the progress of the work of mending "or making, and the buying or selling of such instruments. The 10th "Section does not embrace the case of one who is knowingly a possessor "of any implements or material for the use of another who intends to "employ the same for the prohibited purpose. It would not meet the "case of a vendor of such instruments not being the maker of them. The "English Statute meets these and all cases which are likely to arise."

Clauses 234, 235, and 236

200. It is the making a *die* for counterfeiting coin that is specially punishable by Clauses 234 and 235 of the Code corresponding with Sections 8 and 9 of the Draft Act, with the same penalty as the act of counterfeiting. We conceive that the *die* is specially provided for in these Clauses as the instrument by which the metal is marked so as to represent a coin, that is to say the instrument by which the act of counterfeiting is completed. But we think that any instrument used in the process of coining falling within the same category as the die, as an instrument "upon which there shall be made or impressed, or which will

Section 10 of the Statute

"make or impress, or which shall be intended to make or impress the figure, "stamp, or apparent resemblance of both or either of the sides" of any coin, that is to say any instrument which bears on its face such mark as evidently signifies that it is designed to be used in the process of counterfeiting a particular coin, considering the making of the die to be a part of such process, ought to be included. We would also provide in the same Clauses for buying and selling, mending, and having in possession any such instrument. We would therefore alter Clause 234 as follows. "Whoever makes, mends, buys or sells, or has in his possession any die, or "other instrument, appearing by any mark on the face of it to be adapted "for the purpose of counterfeiting coin, intending or knowing it to be likely "that it may be employed for the purpose of counterfeiting coin, shall, &c." The same alteration of course to be made in Clause 235 designating the coin as the Queen's or the Company's.

201. Clause 236 would then apply to implements, &c., not so significantly marked as adapted for counterfeiting particular coins, found in the possession of any person, regarding which there may be independent proof, circumstantial or positive, that he had the intention of employing the same for the purpose stated.

Clauses 240, 241, 243 and 244, corresponding with Sections 14, 15, 17, and 18, of the Draft Act with respect to counterfeit coin, Clauses 249 to 252, corresponding with Sections 24 to 27, respecting coins of which the weight has been wilfully diminished or the composition altered

202. Sir Laurence Peel remarks that "knowledge of the coin "being counterfeit contemporaneous with the first reduction of such "coin into possession is treated throughout the Act as a test of the "criminality of such possession." The Clauses which require such contemporaneous knowledge to be established are those directed against the professional dealers in false coin; their having received the false coin found in their possession, or which they have delivered or attempted to deliver to any other, knowing at the time they received it that it was false, is made the test of their being such dealers. The reason of distinguishing such dealers from the casual utterer, is well stated in Note I, and it appears to us satisfactory.

203. To meet objections made by Sir Laurence Peel to the phraseology of Clauses 240 and 241 and of Clause 242 which appear to us to be valid, we would alter them, the two former by substituting "intending or knowing it to be likely that such counterfeit coin may "pass as genuine," for "with the intention that such counterfeit coin "shall pass as genuine," and the latter by substituting the same words for the words "as genuine."

204. This alteration of Clause 242, will not cause it to embrace such a fraud as that adverted to by Sir Laurence Peel, termed "ringing

" the changes," but it seems to us that the practice which he describes should be dealt with as a cheat rather than as a case of uttering or putting off false coin. It consists apparently in sleight of hand by which a man exchanges a bad coin for a good one, and deceives the person from whom he has just received the good coin into believing that the bad one is that which he gave; in such a case if the former succeeds in obtaining from the latter a good coin for the bad one which he pretends to return, it will be cheating under the definition of that offence in Clause 392 of the Code.

205. By the words proposed to be introduced into these three Clauses by which they will be made so far to correspond with Clauses 243 and 244, we think the offender could scarcely escape conviction in any of the other cases mentioned by the Chief Justice. If it could not be proved that the person uttering false coins had knowledge that they were false at the time he received them, he would be charged under Clause 242, and by the alteration he would be liable not only if he put them off as genuine, but if, as in the case mentioned by Sir Laurence Peel, he sold them to a common utterer, without representing them to be genuine, knowing his character, and well aware that his purpose was to pass them as genuine, a case which the Clause as it stands would not reach.

206. We think that an alteration should be made in Clauses 249 to 252, corresponding with that which we propose to be made in Clauses 240 to 242, and we would describe the object intended by the same words in Clauses 251 and 252 as in Clauses 249 and 250.

207. We agree with the Chief Justice in the objection he takes to the punishment of the offence defined in Clause 242 by fine only, we would add " or with imprisonment for a term which may extend to six " months, or both."

208. Sir Laurence Peel observes that the 14th and 15th Sections of the Draft Act corresponding with Clauses 240 and 241 of this Chapter " would not reach one common case of dealing with counterfeit " coin as selling by one not being the coiner, and after the coin is made, " who has not the coin at the time of sale, and who does not deliver it." But as the seller must order delivery, he would fall under the Law of Abetment as instigating the person having possession to commit the offence defined in the said Clause, and would be liable to the punishment of the offence by Clause 88 of this Code. The objection therefore will not hold if the provisions of this Chapter be passed as a part of the Code.

209. Sir Laurence Peel remarks that the Sections of the Draft Act from the 24th to the 27th corresponding with Clauses 249 to 252 of the Code are " apparently in conflict with the law as to currency " in force here" (within the jurisdiction of Her Majesty's Courts,) that is the Common Law, by " which debased coin not counterfeit did not lose " its currency as money nor could it be refused as a tender." " The Act," he adds, " seems to proceed on the assumption of the existing law forbid- " ding the circulation by an innocent holder of debased coin not coun- " terfeit. But it does not in terms enact this; and it would be the subject " of doubt whether by implication from its provisions the law as to " currency be altered or not."

210. It is to be observed that Act XVII. of 1835 makes certain Silver coins of the Company's Mints a legal tender in satisfaction of all engagements, provided they are not diminished more than a certain proportion in weight, and are not clipped or filed or defaced otherwise than by use; and such as are so diminished, &c. of course may be refused. But the Code does not make the circulation of debased coin by an innocent holder an offence, any more than the circulation of coin which has been reduced below the proper weight by use; it is an offence to pass debased coin only when the party passing it knew when he became possessed of it that it had been diminished in weight, or altered in composition, against the provisions of the Code making such diminution or alteration an offence.

Clauses 246 and 247

211. Sir Laurence Peel points out that the proposed law differs from the English law in not making a distinction between counterfeiting Gold and Silver coin and counterfeiting Copper coin. He thinks the distinction reasonable. There has been no such distinction hitherto in the laws regarding coinage contained in the Regulations of the several Presidencies. The Act 9 Geo. IV. Chapter LXXIV. in force in Her Majesty's Courts in India, provides only for offences relating to Gold and Silver coin, and so does the Code of Louisiana. The Penal Code of France makes the same distinction as the law of England between Gold and Silver money and Copper money. It seems to us to be worthy of the consideration of Government whether the distinction observed by the English law should not be introduced into the Code.

212. Sir Laurence Peel also points out that the proposed law disregards the distinction between current coin and coin not current which is observed in the English law and the existing law here within the jurisdiction of Her Majesty's Courts. Coins absolutely uncurrent, that is not used as money, are excluded by the definition in Clause 230.

The currency, speaking generally, may be said to consist of the Company's coin, and the proposed law provides by more severe penalties against the falsification thereof, as an offence highly injurious to the public, while lesser penalties are provided against the falsification of other coins which enter into the circulation in an inconsiderable degree comparatively, excepting the Queen's coin which, though not entering largely into the circulation, honoris causâ is put on the same footing as the Company's.

213. Objection is taken by Sir H. Seton, and also by Mr. G. W. Bacon, to the words "knowing it to be likely" in Clauses 243 and 244. Sir H. Seton says, "A gets possession of counterfeit coin with a view "to destroy it, knowing it to be likely that such counterfeit coin may "pass as genuine if left in the possession from which he takes it—must "he be imprisoned for not less than two years?" (Clause 244.) Mr. Bacon illustrates his objection by the following case—"A, a collector "of curiosities, purchases counterfeit coins knowing them to be such, and "not intending but *knowing it to* be likely from the goodness of the "counterfeit that such coin *may* be passed as genuine." "A is guilty," Mr. Bacon observes, "of the offence in Clause 243." We do not think that under the construction of the phrase "knowing it to be likely," which by a comparison of the many places in which it is used in this Code it is manifestly intended to bear, the party possessing counterfeit coins could be convicted in either of these cases. In order to a conviction there must be circumstances leading fairly to the inference that the party kept the coins in his possession contemplating it as a likely result that they might pass as genuine, not as what might possibly happen, but as what was likely to happen. We beg to refer to the citations in paras. 105 and 106 of our first Report on this point.

214. Adverting to Clause 241, Sir H. Seton says—"A wins a pool at "commerce in which he finds a bad shilling which he puts into the next "pool as his stake—must he be imprisoned for not less than two years?" It does not appear to us that A could be charged under Clause 241 with having received the counterfeit shilling knowingly, and therefore, we take it, he would not be liable to this punishment. We are inclined however to think it expedient to omit or reduce the minimum in this and the following Clauses of the Chapter, as we propose with respect to some of the Clauses of the Chapter relating to the analogous offence of forgery, &c. Vide post.

215. Mr. Norton adverting to those Clauses which make the possession of counterfeit coins an offence, observes that he "does "not think the reasoning sound for fixing the proof of the *object* and "*intent to utter* on the prosecutor in cases where numerous counterfeit

"coins are found in the possession of a party The *knowledge* and "intent of uttering counterfeit coin, where the *actual* uttering takes "place, may be required in substantive proof, because the circumstances "of it are extant on which a judgment can be formed. But where *no* "*act* is done at all, there is scarce a possibility of proving any secret "object and intent—though pregnantly suspicious circumstances are, in "such a case as this, a legitimate ground for a party to prove, what he "alone can prove, the lawful excuse, or account for such possession of "numerous articles of base coin—and *such is the principle of the English* "*Criminal Law on this* and other similar subject-matter, *had it been* "*thought worth the inquiry to ascertain it.*" In answer to these observations, so far as the authority of the English Criminal Law is concerned, and with reference particularly to the words we have put in Italics in the last passage, it is only necessary to mention, what it seems strange Mr. Norton did not ascertain, that on the point in question the Code is in accordance with the English Statute, the latter running thus—"if any "person shall have in his custody or possession three or more pieces of "false or counterfeit coin," &c. *knowing the same to be false or counter-* "*feit, and with intent to utter or put off the same,* every such offender shall", &c. Under the Code however conviction will be easier by reason of the words "or knowing it to be likely that such counterfeit coin may "pass as genuine."

2 Wm IV C. 34, Section 8

216. We have noticed that Clause 237 makes it an offence to abet the counterfeiting of the Queen's or Company's coin, but not of other coin, *without* the Territories of the East India Company. It has been suggested that excluding Spanish Dollars and other coin which in some places are largely current may be found "highly prejudicial to "commerce." Referring particularly to the Settlements in the Straits, in which we believe the Spanish Dollar is the coin most current, and in which there is much complaint of the introduction of counterfeit coin of that description made without the Settlements, probably at the instigation of persons within the Settlements, it may be thought advisable to insert before Clause 237 a Clause corresponding to it against persons abetting the counterfeiting of coin without the Territories of the East India Company *intending that such coin may be imported into the Territories of the East India Company.* The words in Italics which are not in Clause 237 appear to be necessary to constitute an offence properly punishable by this Code, whereas to abet the counterfeiting the Queen's or the Company's coin is an offence which when committed by persons residing under the Government of the Company and owing allegiance to Her Majesty is properly punishable without reference to the intention as to the disposal of the counterfeit coin.

217. It appears to us advisable to substitute for the explanation annexed to Clause 232, a definition of what is meant by counterfeiting coin, including the substance of that explanation, as follows:—"A person "is said to counterfeit coin who makes a false coin to resemble a genuine "coin, or a genuine coin to resemble a different coin, intending to "deceive by means of that resemblance." See Clause 20.

218. It seems to us also that a definition should be given of the coin designated as the Queen's coin, as well of that which is designated as Company's coin, which should be in accordance with the definition in Section XXI. of the Statute 2, Wm. IV., Chapter XXXIV. viz. "any coin coined in any of Her Majesty's Mints and lawfully current "in any part of Her Majesty's dominions, whether within the United "Kingdom or otherwise."

CHAPTER XIII.

OF OFFENCES RELATING TO WEIGHTS AND MEASURES.

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219. Mr. Norton observes that "there are redundancies of "language in this Chapter from which misconceptions may possibly "arise," as for instance "*fraudulently* using weights *known* to be *false*," and with reference to the word "dealing" particularly, he says, he is doubtful whether by using this word rather than *selling* it is meant "that *all* persons *using in any manner false weights*, &c. are to be "brought within the Chapter." We apprehend that *not* "all persons "using in any manner," but "all persons *fraudulently* using in any "manner false weights, &c." are meant. The word "dealing" is used instead of "selling" obviously as being more comprehensive. We do not agree with Mr. Norton that there is any redundancy in the set of words cited by him as above—every word appears to us to be necessary.

220. With reference to Clause 255, Mr. Norton suggests that the possession of a false balance, &c., would be enough to shew guilt without evidence of intention to use them fraudulently. The intention however must be alleged in laying the charge, though it may be matter of inference only, from the fact of the possession, and the attending circumstances as manifesting the purpose, and the inference may of course be rebutted.

221. Mr. Blane suggests that the provisions in Clause 253, &c., ought not to apply to scales but only to weights and measures, as Indian scales are generally of the rudest construction, seldom correct, and the incorrectness always visible to the purchaser. "No doubt," he remarks, "the intent of fraud is specified, yet it appears doubtful how that inten-"tion is to be ascertained." But where the incorrectness of the scale is so visible, and there is no attempt to cover or conceal it, there can be no ground for imputing fraud from that defect alone; the circumstances negative the intention of fraud, and no charge would lie against the party using such a balance. On the other hand a false balance artfully contrived to elude detection in the use of it, carries with it a presumption of fraudulent intention, which properly brings it within the scope of the Chapter.

222. It has been suggested that it may be expedient to provide in this Chapter for the fraudulent use of a true balance. This it appears to us is an offence which falls within the definition of "cheating," under which head it will be liable to the same punishment as the offence of using a false balance under this Chapter.

CHAPTER XIV

OF OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, AND CONVENIENCE.

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223. This Chapter comprehends provisions on subjects which in the Digest of the English Criminal Law are distributed in two Chapters under the heads of "Offences against public health, comfort, and convenience," and "Common Nuisances."

Chapter XII
Chapter XIII

224. The first Clause in the Chapter (257), for the punishment of persons doing what is likely to spread the infection of any disease dangerous to life, corresponds with Article 6, Chapter XII. of the Digest, but is more comprehensive, the said Article being limited to the offence of exposing in public places persons labouring under infectious and contagious diseases. What is wanting in this Article appears to be supplied by the generality of the definition of common nuisance in Article I. of Chapter XIII. The punishment in the Digest is imprisonment which may extend to one year, or, if the offence fall under nuisance, to two years, or fine, or both, whereas in the Code the term of imprisonment is limited to six months. We think that the word "human" should be inserted before "life" in Clause 257, as it is in Clause 265 and elsewhere, for though in Clause 33 it is explained that the word "death" denotes the death of a human being unless it be otherwise expressed, there is no such explanation in regard to "life" as denoting human life exclusively.

4 and 6

225. Clause 258 provides for breaches of the law of quarantine, limiting the penalty to imprisonment for six months, or fine, or both. For the greater breaches of the quarantine law the penalty in the Digest is transportation for seven years or imprisonment not exceeding three years. For the minor offence of quitting a vessel liable to quarantine before it is discharged the penalty is imprisonment for six months and fine of 300£.

Chapter XII, Art 1.

226. Many gentlemen have expressed an opinion that the limitation of the term of imprisonment in Clauses 257 and 258 renders the penalty inadequate. Mr. Pyne, Judge of the Bombay Sudder Court, particularly observes that *malignantly* committing the offence defined in

Clause 257 appears to be deserving of the penalties provided for the offence described in Clause 294, voluntary culpable homicide. He asks "could a person malignantly propagate plague in a populous town "without believing it to be likely to cause death." If any person died of the plague and his death could be traced to infection so caused maliciously, the person who caused it, we apprehend, would be chargeable with homicide under Clause 294. It is contrary to the principle of the Code to punish acts which the doer when he committed them knew to be likely to cause certain evil results, if in fact such results were not produced, in the same manner as if such evil consequences had actually flowed from them, but we are inclined to think that the term of imprisonment in these Clauses, which is the same as for adulteration of food or of medicines, is too limited.

227. There are two Clauses (259 and 260) regarding the adulteration of food or drink, one for adulterating, and the other for selling and offering for sale adulterated food or drink, and two Clauses (261 and 262) as to the adulteration of medicines, with an additional Clause (263) for selling, &c. any drug as a different drug. The term of imprisonment in all these Clauses is limited to six months, but the fine, which in the Clauses respecting food is limited to 500 Rupees, is extended to 1,000 Rupees in those relating to medicines.

228. In the Digest there is an express provision for *selling* unwholesome food or provisions, but not for adulterating food, &c., but it would seem that there are statutory provisions prescribing penalties for the adulteration of both food and drink. The punishment laid down in the Digest for selling unwholesome food is imprisonment which may extend to one year, or fine, or both.

Stephens' Summary of Criminal Law, p 100.

229. The adulteration of drugs, &c. and the selling of adulterated drugs does not appear to be provided for specifically in the Digest of the English Criminal Law.

230. Clause 264 provides for the punishment of any person who "voluntarily causes the atmosphere in any public way to be in a state "noxious to health or offensive to the senses." It has been asked why is this provision confined to "a public way?" We are not aware of the reason for this limitation. In the Digest there is a provision for this kind of offence as affecting the *neighbourhood*, and another corresponding with the one under consideration, as affecting the Queen's subjects "using any public highway or thoroughfare, or frequenting any market "or other place of public resort." It appears to us that the former

Chapter XIII, Art. 8. 12.

provision is as much required as the latter. Exception has been taken to the term "offensive to the senses" as "likely to give rise to capricious prosecutions." The word "offensive" is used in the corresponding Article of the Digest in the same sense apparently. The punishment in the Code is limited to imprisonment for one month, or fine to the amount of 500 Rupees, or both. The punishment provided in the Digest is imprisonment not exceeding one year, or fine at discretion, or both. It seems to be worthy of consideration whether the punishment in the Code should not be extended.

231. Clause 265 provides for the offences of driving or riding in a public way in a manner so rash or negligent as to indicate a want of due regard for human life. The English law does not distinctly provide for this offence except when some injury has been caused by it, and then the provision is limited. The Digest contains a special provision taken from the Statute Law for injury caused by the furious driving of *a stage coach or any public carriage*, except a hackney carriage.

Chapter XV, Sec 5, Art 40.

232. We think it highly expedient to punish the offence defined in Clause 265, which is always dangerous and terrifying, irrespectively of actual mischief caused by it. If grievous hurt is caused, the offender will be liable to additional punishment for it under Clauses 327 and 328. If death is caused, his punishment will be cumulative under Clauses 304 and 305.

Chapter XIII Art 1.

233. Perhaps the terms of the definition of "nuisance" in the Digest of the English law, may be construed to include this offence as "tending to cause common injury, damage, inconvenience or annoyance "to the Queen's subjects," "in respect of their personal safety;" in which case the offender will be liable to the same punishment as is provided for the offence in Clause 265 of the Code, namely, imprisonment not exceeding six months, or fine, or both, except that the fine, which is limited in the Code to 2000 Rupees, is left to discretion in the Digest.

Art 18.

234. Mr. Norton says, "As regards those criminal acts—such as "driving violently, negligently using fire or combustible matter, leaving "buildings in a dangerous state—the criminality of which is made to "depend on 'want of regard to human life,' it appears to me that such "want of regard is hardly capable of proof except from the result. At "the same time other acts, such as 'rash and negligent dispensing "'poisonous substances' are such as by their inherent nature indicate such "want. The mere doing of such acts, I consider to be offences of a "greater or minor shade—and if actual death does follow thereby, of "course the offence becomes of a different quality."

235. We cannot agree with Mr. Norton that want of regard for human life is hardly capable of proof, in the instances he specifies, except from the result. Supposing, to take the first instance, that a person driving a vehicle in a crowded thoroughfare urges the horses to such speed that it is impossible for him to stop their course suddenly, and that a passenger is knocked down by them and killed on the spot, no doubt under the law of England the driver would be found guilty of manslaughter, because of the reckless manner in which he drove. Now if the passenger was just saved by the timely effort of another person pulling him out of the way, would not a want of due regard for human life on the part of the driver be as justly inferred from the manner of his driving, proved as we may assume by the evidence of those two persons, the one who had been in imminent peril of his life and the other who happily saved him, as if the result had been a fatal accident? So in the other instances the want of due regard for human life upon which the criminality depends, is a matter of inference from the circumstances, and wherever the circumstances proved are such that if loss of life had ensued the party committing the act would be answerable for it criminally, the same circumstances will sufficiently warrant a conviction of the simple offence where no injury has resulted. The certainty of punishment, though it be small, for the acts or omissions dangerous to life, specified in the Clauses from 265 to 273 of this Chapter, will be far more efficacious, we conceive, in restraining men from such acts, and preventing such omissions, than the distant apprehension of severe punishment in the event of an accident resulting therefrom, by which a life may be lost or some serious injury suffered. The Code combines both.

236. Mr. Norton remarks that the words "knowing" and "knowingly" "seem to be used in this Chapter indiscriminately and without "any ruling principle," that they are "inserted where they had better "have been spared," and omitted "where *the guilty* knowledge is of the "substantive essence of the offence," "for I imagine," says he, "that the "adulteration of food or drugs can hardly be criminal unless shewn to "have been of wilful knowledge." This criticism appears to us to be quite gratuitous. With respect to the adulteration of food or drugs a guilty knowledge is plainly implied in the definitions in Clauses 259 and 260.

237. Mr. Fagan proposes a general Clause for acts, such as are described in Clauses 265 to 273, done so rashly and negligently as to indicate a want of due regard for the safety of *property*, rendering persons so acting punishable with imprisonment to the extent of one month or fine to 500 Rupees. We are of opinion that the Commis-

sioners exercised a sound discretion in making the want of due regard for human life the criterion of criminality in such acts.

238. Mr. Fagan also proposes a Clause for the punishment of a person keeping a house of entertainment for travellers refusing to entertain any traveller without reason. There is a provision to this effect in the Digest, in which the offence is declared to be a common nuisance, but it does not appear to us that such an enactment is called for in this country, where there are so few establishments to which it would be applicable.

Chapter XIII, Art. 16

239. Again, Mr. Fagan suggests that there should be a provision for the punishment of any person who in any public way pursues any means of livelihood or performs any act which is repugnant to the religion, subversive of the morals, or opposed to the feelings of the public. Partly, and perhaps as far as is necessary, the purpose intended appears to be provided for between Clause 274 of this Chapter, Clause 282 of Chapter XV. and Clauses 486 and 487 of Chapter XXVI.

CHAPTER XV.

OF OFFENCES RELATING TO RELIGION AND CASTE.

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240. The principle on which this Chapter has been framed is stated and explained in Note J. "It is this, that every man should be "suffered to profess his own religion, and that no man should be suffer-"ed to insult the religion of another." The Commissioners have well said that this is a principle "on which it would be desirable that all "Governments should act, but from which the British Government in "India cannot depart without risking a dissolution of society." "There is perhaps no country in which the Government has so much to "apprehend from religious excitement among the people. The Chris-"tians are numerically a very small minority of the population, and in "possession of all the high posts in the Government, in the tribunals, "and in the army. Under their rule are placed millions of Mahome-"dans, of differing sects, but all strongly attached to the fundamental "articles of the Mahomedan creed, and tens of millions of Hindoos, "strongly attached to doctrines and rites which Christians and Maho-"medans unite in reprobating. Such a state of things is pregnant "with dangers which can only be averted by a firm adherence to the "true principles of toleration."

241. Though objections have been made to this Chapter by many persons, it does not appear to us that the general principle has been impugned. We understand the objections to apply mainly to the special provisions contained in Clause 282 and the following Clauses to the end.

242. With respect to Clause 282 we shall quote the words of the Commissioners—"In framing Clause 282 we had two objects in view. "We wish to allow all fair latitude to religious discussion, and at the "same time to prevent the professors of any religion from offering, "under the pretext of such discussion, intentional insults to what is held "sacred by others. We do not conceive that any person can be justified "in wounding with deliberate intention the religious feelings of his "neighbours by word, gesture, or exhibitions. A warm expression "dropped in the heat of controversy, or an argument urged by a person "not for the purpose of insulting and annoying the professors of a

" different creed, but in good faith for the purpose of vindicating his " own, will not fall under the definition contained in this Clause."

243. Mr. J. F. Thomas submits the following observations—" It " appears to me a dangerous novelty liable to extensive abuse, that a " man should be subject to a criminal prosecution for every gesture, or " sound that he may utter, offensive to the religious feelings, or preju- " dices of another. There can be no limit to criminal prosecutions, nor " to the variety of sentences under Clause No. 282. One Judge may, in " his charity, assume, that there could be no 'deliberate intention' of " wounding the feelings, and so absolve all offenders—another, may " adopt the maxim, that the act itself indicates such intention. And if " the Criminal Courts are to be at all times open to the zealots of differ- " ing sects, on every trifling occasion, the result must be to foster " bigotry, and to keep the religious animosity of sects at its height, as " well as to interfere with individual security and peace. I give, as an " instance of the evil which might result from the law, a fact at one time " constantly under my notice. The old Saivite Pundit, Sudr Ameen of " the Combaconum Court, in his daily public lustrations in the Caveri, " poured abuse on Vishnu, and might consequently have been brought " before me as a criminal, for an act, little regarded by any but a few " zealots like himself, and which he deemed a religious duty."

" My experience also of the bigotry, and keen hatred of the opposing " Vaishnava Sects of Srerungham, the Tengala and Vadagala, of the " opposing Mahomedan Sects, Sooneds and Shecas, of Masulipatam, and " elsewhere, and their ready recourse to the Courts of Law as a means " of mutual annoyance, would lead me strongly to deprecate this " provision. I greatly doubt its justice also, for under it, both the " Christian and Mossulman would be subject to penalty for the " undisguised, and natural expressions of their views of the evil " and folly of idolatry."

244. Mr. Norton says—" I know not how to construe acts as " 'wounding religious or other feelings' and insulting 'religion.' It is " impossible to say to what absurdities the criminality of 'uttering any " a word, or sound, or making any gesture, in hearing or sight of a person, " 'with the intention of wounding his religious feelings' (Clause 282) " may be carried out."

245. The Judges of the Sudder Court in the North Western Provinces would prefer the phrase "insulting" to "wounding" in Clause 282, or would prefix to "wounding" the word "wantonly." A Missionary

they observe, must necessarily, if he be in earnest, use such arguments as are calculated to "wound" the religious feelings of his hearers, without meaning wantonly to insult them.

246. Mr. Giberne, Judge of the Bombay Sudder Court, says—"This "Clause might, I think, be excluded, for it almost amounts to a "prohibition to preaching the Gospel."

247. Mr. Sharkey suggests that an explanation should be annexed to this Clause to the same effect as that given by the Commissioners in the last sentence of the passage quoted above from note J.

To Secretary to Government, Legislative Department, not dated, received 24th March 1838.

248. The "Missionaries of various Protestant Societies, both of the Establishment and Dissenting Bodies, labouring in Calcutta and its vicinity," have remonstrated against Clause 282 and some other parts of this Chapter. They say they "consider Clause 282 as specially calcu-"lated to operate injuriously to themselves and disastrously on the "spread of Divine Truth—Deliberate and wilful intention will surely "be as strenuously, and honestly too, disclaimed by the zealous Mis-"sionary, as it will be attributed to him by those who deem their reli-"gious feelings wounded or insulted, when their understandings are "simply reasoned with. If it be establishable at all, it can only be by "inference. But inference may be variously drawn from the very same "overt acts, according to the light in which they are beheld by the "adjudicators—so, 'any word or sound,' will include all discussion or "announcement whatever: 'any gesture,' all ordinary animation in "the advocate of truths the most interesting. Assuredly, if tried by "these rules, there is not a discourse or expostulation of Prophet or "Evangelist in the New or the Old Testament, nay, not of our Divine "Saviour himself, which would not be thought to wound, and keenly to "wound, the feelings of a zealous Jew, Mussulman, or Idolater, and "which, if so, must not be held forbidden, under the new Code, to be "either recited or imitated in the discourses of the Missionaries." "What an inlet, then," they proceed, "to an incessant imputation of "'deliberate and wilful intention to wound or insult the feelings of "'Hindus,' would be opened by the passing of Clause 282 of Chapter "XV.! A fortiori may this be said in the case of Mussulmans, a fiercer "and more vindictive people, proud of a supposed superiority, and "possessed with a rancorous hatred of and contempt for Christianity—"justly may it be apprehended that the passing of Clause 282 into a "law, would ere long prove a prolific source of vexatious law suits, at "once harassing to the most unoffending Missionary, and largely adding "to the burthen of business in the Courts."

p 85 249. The Commissioners on the Criminal Law of England in their 6th Report observe that "the course hitherto adopted in England res-
"pecting offences of this kind has been to withhold the application of
"the penal law, unless in cases where insulting or contumelious lan-
"guage is used, and where it may be fairly presumed that the intention
"of the offender is not grave discussion, but a mischievous design to
"wound the feelings of others, or to injure the authority of Christianity
p 82 "with the vulgar and unthinking by improper means." In the laws of the other European nations, offences of this class, it is remarked by the Commissioners, are invariably made to consist in the use of indecent railing or scurrilous language on the subject of religion and matters connected therewith. The reasons for distinguishing such offences and rendering them penal, viz. the preservation of religious peace and the protection of all men in the free exercise of that particular form of
p 81 religion which they profess, the Commissioners observe, depend upon principles of general policy and toleration too obvious to require special notice.

250. It seems then to be by no means a novelty to punish persons who transgressing the bounds of legitimate discussion give utterance to railing and contumelious language with the deliberate intention of wounding the religious feelings of any person.

251. The Missionaries "readily acknowledge that insults may and "ought to be prohibited." "But," they contend, "if the feelings of the "weaker i. e. the losing party in a discussion, conducted though it may "be upon the most equitable terms, be admitted to decide, then argu-"ments the fairest and the most moderately expressed, will certainly "always be deemed wounding; nay they will be regarded as insults; and "may even be represented to be designed insults, by simply shewing "that their wounding tendency must not only have been perceived, but "anticipated as unavoidable by him who presses them; while yet, in "truth, they are the only rational and moral means furnished by our "common Creator, of opening the understanding and leading to reflec-"tion; even sarcasm itself is often the only answer that can be given to "positions too absurd to be gravely argued."

252. The authors of the Code declare that "a warm expression "dropped in the heat of controversy, or an argument urged by a person "not for the purpose of insulting and annoying the professors of a "different creed, but in good faith for the purpose of vindicating his "own, will not fall under the definition contained in this Clause." We understand these instances to be mentioned as indicative of the strictness

with which the definition is to be construed, so as not to make a person criminally liable for words, &c., wounding the religious feelings of another, unless a deliberate intention so to wound his feelings be unequivocally manifested, as it would be by mere railing and abuse, and by offensive attacks upon his religion under the pretext of discussion, without any argument which an impartial arbiter could reasonably believe to have been addressed to him in good faith merely for the purpose of convincing him of the truth. It is here to be observed that it is not the impression of the offended party that is to be "admitted to decide" whether the words uttered deserve to be considered as insulting, and whether they were uttered with the deliberate intention of insulting; these are points to be determined upon cool and calm consideration of the circumstances by the Judge. The intention to wound must be *deliberate*, that is, not conceived on the sudden in the course of discussion, but premeditated; it must appear, not only that the party, being engaged in a discussion with another on the subject of the religion professed by that other, in the course of the argument consciously used words likely to wound his religious feelings, but that he entered into the discussion with the deliberate purpose of so offending him. In other places in the Code a party is held to be guilty if he causes a certain effect the causing of which is an offence, intending to cause that effect, *or knowing that his act was likely to cause it.* Here there is a marked difference. Although the party uttering offensive words might be conscious at the moment of uttering them that they were likely to wound the feelings of his auditors, yet if it were apparent that he uttered them on the spur of the occasion, in good faith, simply to further his argument—that he did not take advantage of the occasion to utter them in pursuance of a deliberate purpose to offend—he would not, we think, be liable to conviction under Clause 282. If however a party were to force himself upon the attention of another, addressing to him, an involuntary hearer, an insulting invective against his religion, he would, we conceive, fall under the definition, for the reasonable inference from his conduct would be that he had a deliberate intention of wounding the religious feelings of his hearer.

253. But we agree with those who think that there would be a difficulty in drawing the line, and that different men would be apt to take very different views of what ought to be considered as evidencing a deliberate intention of "wounding the religious feelings." And under our view of the construction intended to be given to the Clause, we agree with the Sudder Court for the North Western Provinces that it would be better to change the expression by substituting "insulting" for "wounding." When a man in the course of an argument uses insulting

words to another it is impossible to suppose that he does so without the intention of insulting him—it is not to be believed that he uses them in good faith simply for the purpose of convincing or persuading the person with whom he is arguing. In such a case the intention is to be inferred from the character of the words. Again when words not positively insulting in themselves are used in a manner clearly evidencing a deliberate intention to insult the religious feelings of another, the case will fall within the Clause. But it will not be an offence when any person arguing with another on the subject of his religion says what is likely to wound his religious feelings, in good faith, simply for the purpose of convincing the person with whom he is arguing of what he believes to be the truth.

254. We are, though not without hesitation, inclined to think that in the very peculiar circumstances of this country, discourse addressed to any person with the intention of converting him from the faith he professes, which, however it may wound his religious feelings, is not couched in insulting language, nor forced upon him in an insulting manner, should not be considered a crime.

255. In England an attempt to convert any one from the religion of the country by the most gentle and dispassionate address, is by law an offence; to attempt the same thing by contemptuous or vituperative language is an offence which would be severely punished in practice. But the reason is that conversion is not recognized as a legitimate object. The law assumes the truth of Christianity. But it is manifest that the Law and the Legislature of this country cannot assume the truth of any religion. And, as free discussion, or, in other words, attempts at conversion, is the best criterion of the truth of any thing the truth or falsehood of which is not already assumed by law to be beyond controversy, it seems to follow that a bonâ fide attempt to convert ought not in this country to be treated as a crime, even though the intention to convert be an intention to do so by wounding the religious feelings of the person addressed. We apprehend it is almost impossible to convert a sincere or ardent votary of any faith without wounding his religious feelings in the early stages of the process. And if that be so, and if it is admitted that attempts at conversion from one faith to another ought not to be punished in British India, then the wounding of religious feelings ought not to be punished when the wound is inflicted with that legitimate object.

256. The following passages from Sir T. More's Utopia, appear to us instructive with reference to the existing state of things in regard to religion in this country.

257. The founder of the Commonwealth of Utopia, it is stated, "made a law that every man might be of what religion he pleased, and "might endeavour to draw others to it by the force of argument, and by "amicable and modest ways, but without bitterness against those of "other opinions; but that he ought to use no other force but that of "persuasion; and was neither to mix with it reproaches nor violence; "and such as did otherwise were to be condemned to banishment or "slavery." He made this law seeing that "there were several sorts of "religion not only in different parts of the island, but even in every "town"—"not only for preserving the public peace which he saw "suffered much by daily contentions and irreconcileable heats, but "because he thought the interest of religion itself required it." He did not give a sanction by law to any particular religion as the true one, but "supposing that only one religion was really true, and the rest false, he "imagined, that the native force of truth would at last break forth "and shine bright, if supported only by the strength of argument, and "attended to with a gentle and unprejudiced mind; while, on the other "hand, if such debates were carried on with violence and tumults, as the "most wicked are always the most obstinate, so the best and most holy "religion, might be choaked with superstition, as corn is with briars and "thorns; he, therefore, left men wholly to their liberty, that they might "be free to believe as they should see cause."

258. The propriety of the provisions in the Clauses of this Chapter preceding Clause 282, for the punishment of persons intentionally destroying or defiling places of worship, or objects held sacred by any class of persons, and for the purpose of protecting assemblies held for religious worship and for guarding places of sepulture, and protecting persons engaged in funeral rites, &c. appears to us to be sufficiently manifest. We have to notice, however, objections made by the Missionaries to two of these Clauses. Clauses 275 to 281.

259. They observe that in Clause 276, "a similar inlet to that "before remarked upon is opened for a litigious zeal to expend itself in "vexatious accusation of the Missionary who should, as heretofore, deem "it his duty to address the natives of this country at *Melas* and other "places of resort for religious observances, such as Jugurnáth, Gungá "Ságar, &c. He may as now, but quietly commence the reading of an "inoffensive tract, and when curiosity or some other motive has gathered "around him a small number of persons, may proceed to proclaim the "message of the Gospel of God our Saviour, and thereby become liable "to what hitherto he was not, an accusation of wilfully causing disturb-"ance to an assembly lawfully engaged in the perfomance of religious

" worship." The answer to these observations is that no person can be prosecuted under Clause 276 except on an allegation that in causing disturbance to an assembly lawfully engaged in the performance of religious worship or religious ceremonies, he *assaulted* or *made shew of assaulting* or *threatened to assault* some person engaged in such worship or ceremonies.

260. " So too," the Missionaries represent, " by Clause 278 might " the most legitimate act be misconstrued into 'wilfully causing " dis- " turbance in a place of worship, &c.,' though in truth such disturbance " should have proceeded altogether from the aggressions of the accusing " party." Here it is to be observed that the Clause applies to an act done *in a place of worship* whereby a person *voluntarily* causes disturbance, that is to say, according to the explanation in Clause 26, to an act whereby disturbance is caused by him, *he having intended to cause disturbance by that act, or having known it to be likely to cause disturbance.* We think that no one can be convicted by the terms of this Clause, under the circumstances supposed by the Missionaries; and we think at the same time that so cautiously is the Clause worded, that no body can be convicted under it who has not been guilty of an aggression, which, being committed *in a place of worship*, where, by the supposition, a Missionary, that is an adversary of the worshippers, as regards their faith, has no right to enter, where by entering he is in truth trespassing, makes him highly deserving of punishment. Let us only consider what would be the sensation caused by a Mahomedan or Hindoo entering a Christian place of worship when the congregation are engaged in worship, and then and there openly impugning their faith. Supposing him to speak with all the calmness and moderation ascribed to the Missionary, would not the whole assembly be moved with indignation? would not the mere fact of his raising his voice in such an assembly on such an occasion and to such purpose be justly felt as an aggression, an insult? and would it not be thought that there was a defect in the law which did not provide for the punishment of the aggressor?

261. Before passing from these Clauses we would suggest a slight verbal alteration in Clause 280. It seems to us that the word " sepulture," the proper meaning of which is burial or interment, is not sufficiently comprehensive to express what is intended in this place, for it is clear that what is contemplated is any place in which are performed the last offices for the dead, of what nature soever they may be, or in which the remains of the dead are deposited. Instead of a " place of " sepulture" we would propose " any place set apart for the performance of " funeral rites, or as a depository for the remains of the dead."

262. Referring to Clause 283 and the following Clauses, Mr. Norton observes, " surely it may be enough to protect religious faiths, " and ceremonies, by repressing the ordinary outrages against them, " without attempting to put down one species of superstitious imposture, " such as sitting in Dhurna, or conjuring—by visiting it as a crime, for " the purpose of *accrediting another*, under which a weak ignorant mind " is induced to give way to such imposture. And upon the same principle " I conceive the real interests of the people are better consulted in " omitting from a Criminal Code the temporal protection of superstitions " even in regard to the preservation of caste, and in leaving pernicious " prejudices to clear away as civilization advances. A contrary course, " as it appears to me, would have greater operation in encouraging and " perpetuating, than in repressing, what is pernicious."

263. Mr. M. Lewin remarks that " Clause 283 tends to confirm " the ignorant in principles of belief which operate to their prejudice; " the power to injure is believed to exist, because its pretended applica- " tion is met by heavy punishment—people will not believe that the " Government have denounced under heavy penalties, the exercise of a " power which is only imaginary. In England sorcery was punished, as " it was in France, as long as the Government believed in its existence."

" In those districts where the pretended power of imprecating the " vengeance of the Deity, has been punished by the Magistrate, the " practice and belief have extended; where pains have been taken to " expose the cheat, and where the public authorities have openly " discountenanced the belief, it has declined."

264. Sir J. Awdry observes that the offences which are here thrown together are almost all capable of being included clearly, but in general tacitly, under some other head, so that when a wrong had really been committed the Magistrate would be at no loss to visit it, and he advises that they be thus distributed. The form of the law as it now stands he thinks is likely to suggest modes of annoyance to persons of adverse sects against each other. Mr. M. Lewin and others take a similar view of the subject. With respect to Clause 283, Mr. Lewin observes that a threat founded on the species of imposition described in this Clause ought to be viewed with reference to its object; as criminal intimidation (Clauses 186, 483), as an attempt at extortion (Clause 370), or as an abetment (Clause 88); and punished according to the injurious tendency of the act instigated; but the punishment should not be made to depend on the name of the Deity being invoked, nor should any absurd alarm or belief be held to excuse an act in itself wrong.

265. Notwithstanding the precedents that are to be found in Regulations XXI. of 1795 and VII. of 1820 of the Bengal Code, and Sections 34 and 35 Regulation XIV. of 1827 of the Code of Bombay, we are inclined to the opinion that it is advisable to omit the specific denunciation in Clause 283, and to extend Clause 482 which defines "criminal intimidation" so as tacitly to include the species of intimidation against which Clause 283 is directed, by a general expression. We observe that an article against false denunciations of divine judgment which appeared in the Digest of "Offences against Religion" in the 6th Report of the English Criminal Law Commissioners, is omitted in the General Digest submitted with their 7th Report. The Article was as follows—"Whoever shall "falsely pretend to an extraordinary commission from God, or shall "terrify or abuse the Queen's subjects with false denunciations of divine "judgments, shall incur the penalties of the —— class."

Art 5, p 90.

266. With reference to the provisions relating to caste in Clauses 284 and 285, the Commissioners offer the following explanation. "The "intentional depriving a Hindoo of his caste by assault or by deception "is not at present an offence in any part of India, though it may be a "ground for a civil action. It appears to us however that an injury so "wanton, an injury which indicates so bad a feeling in the person who "causes it, and which gives so much pain and excites so much resent-"ment in the sufferer, is as proper a subject for penal legislation as most "of the acts which are made punishable by this Code. We have there-"fore made it an offence. The rendering the food of a Hindoo useless to "him by causing it to be in what he considers as a polluted state is an "injury of the same kind, though comparatively venial. We propose "to make it an offence, but not to deal with it severely, unless it should "be repeatedly committed by the same person."

267. Mr. J. F Thomas says—"Clauses 284 and 285 are not, I "think, matter for a Criminal Code. It would be far better to leave "parties to seek redress for any damage they may sustain, by a civil "action What end, I would ask, is answered, so far as the public is "concerned, by upholding the injurious and unnatural Brahminical "privilege of caste. Suppose a Brahmin does lose caste, he may have "his remedy by a civil action, to recover the amount necessary to "procure his reinstatement, and indemnification for his temporary loss. "Who also is to define what will cause the loss of caste. Swallowing "beef-broth may be supposed to do it in Bengal, but is such the fact— "and is not this an infringement only of caste rules, to be atoned for "by temporary penances and ceremonial observances (Mantrams) In "practice, is loss of caste incurred by any act, short of conversion to

"another faith or cohabiting with a Pariar?" In another place Mr. Thomas argues more at large against the policy of such enactments, which he characterizes as affording the protection of penal provisions to what is in itself injurious to society. Mr. Norton, as we have shewn, takes a similar view. And we find observations to the same effect made by other gentlemen. Mr. H. Frere in particular remarks that to make public Officers take cognizance of offences against caste is to make them conservators of a bad system, and greatly to impede the desirable object of its gradual abolition. Mr. Pelly thinks that the provisions might be merged (as suggested by Sir J. Awdry and Mr. M. Lewin) in other Chapters of the Code, if retained he considers it necessary that caste and what constitutes the loss of it should be clearly defined.

268. It appears to us that the first provision in Clause 284 against an assault by which one person intentionally causes another to lose caste is included in Clause 348, by which whoever assaults any person intending thereby to *dishonor* that person is liable to punishment, for to cause a person to lose caste is emphatically to dishonor him. Again it appears to us that the offence defined in Clause 285, causing food belonging to any person to be in a state in which according to the rules of his caste he cannot use it, if the effect is produced by any positive action upon the food which has made a change in it, or in its situation, as by mixing any substance with it, or by overturning the vessel in which it is placed, is causing a wrongful loss to him within the meaning of the definition of "mischief" in Clause 399, and therefore that it is covered by Clause 405, as a case of mischief committed with the deliberate intention of thereby insulting or annoying the person to whom the wrongful loss involved in the mischief is intended. When the effect is produced otherwise, for example by a person intruding into the place where the food is being prepared, the offence might be brought under the general provision for the punishment of wanton annoyance in Clause 487 by the addition of a few words, the introduction of which we shall propose when we come to that Clause.

269. We are not aware that there is any Clause in the Code which can be construed to embrace the second provision contained in Clause 284, or can be conveniently altered so as to embrace it. We do not think the object of sufficient importance for a separate enactment regarding it.

270. It seems then that the Clauses of this Chapter from 283 to 286 may be omitted altogether from the Code. The Clauses from 275 to 282 we think ought to be retained. But we do not think it necessary to place them in a separate Chapter. We conceive that the Clauses

from 275 to 281 would be properly placed in the Chapter "of offences "against the public tranquillity" after Clause 137, changing the present order of the Clauses from 275 to 279, making 275 to stand last and 276 and 277 after 278 and 279. Clause 280 would then follow Clause 275. We would place Clause 282 in the Chapter "of criminal intimidation "and annoyance" after Clause 486.

CHAPTER XVI.

OF ILLEGAL ENTRANCE INTO AND RESIDENCE IN THE TERRITORIES OF THE EAST INDIA COMPANY.

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271. Exception has been taken to this Chapter on the ground that it does not make provision for punishing the illegal entrance and residence of foreigners. The reason appears to be that the law gives authority for the summary removal of the subjects of foreign States residing or sojourning within the British Territories against the consent of the Government. 55 Geo III., C 84, S 6

272. The exclusive object of this Chapter is to comply with the requirement of Section 84 of the Act of Parliament 3 and 4 Wm. IV. Cap. 85, in regard to subjects of the Queen not Natives of the Territories of the East India Company, entering into or residing in the said Territories.

273. Mr. Norton considers that Clause 287 is "decidedly too "general to be safely acted upon." "*How soon* a person is to register "his arrival by sea, in what manner he is to 'make it known,' what is "meant by 'his destination' or 'his object of pursuit,' he observes, "is left altogether uncertain." Mr. Hudleston says, "I agree with "those who think the word 'intentionally' should follow the word "'Territories,'" in this Clause, that is to say, that a person should not be liable to punishment for omitting to report his arrival in the Company's Territories unless the omission were intentional. Mr. Pelly suggests that a time should be given for making the required report.

274. This Clause being intended to correspond as near as can be with the proviso in Section 81 of the Statute, we think that the words "from any port or place not within the said Territories," which are found therein, should likewise have place here. We think also that a certain time should be fixed, the lapse of which without complying with the condition specified in the said proviso and expressed in this Clause, should subject the party omitting to comply with it to the penalty. We do not think it necessary to introduce the word "intentionally." The party is bound to make himself acquainted with the law, and his omission to comply with what it requires in this behalf in a reasonable time may

be taken to be intentional. We would suggest that the time be thirty days.

275. The Clause modified, as we think advisable, might run as follows—" Whoever, being a subject of the Queen, and not a native of " the Territories subject to the Government of the East India Company, " arrives by Sea in any place within the said Territories from any port " or place not within the said Territories, and does not, within thirty " days thereafter, make known in writing his name, place of destination, " and object of pursuit in India to the Chief Officer of Customs, or other " Officer authorized for that purpose at the place at which such subject " of the Queen has arrived, shall be punished with fine which may " extend to One Thousand Rupees." The phrases which Mr. Norton objects to as indefinite it will be observed are retained. They are taken from the Act of Parliament, and we do not perceive how there can be any question as to what is meant by " place of destination" or " object of pursuit in India" or as to " *the manner*" in which a person is to make known his name, &c., when he is expressly directed to make it known *in writing*.

276. Mr. Blane observes with reference to Clause 290, that " it is " not clear what will constitute the offence of again residing. If a " person convicted under Clause 289 does not quit the Territories, is " this a repetition ? If so the time for departure should be defined, or a " power of deportation given to the public authority." The question asked by Mr. Blane is no doubt to be answered in the affirmative. In the Act 53, Geo. III. Cap. 155, Sec. 101, there is a similar provision for the case of a person being convicted a second time of the offence of residing in the East Indies without a licence, without any explanation as to the time within which a party once convicted must depart to avoid a second prosecution, and it does not appear to be necessary to define this any more in regard to the particular offence in question than as to any other by persisting in which the offender renders himself liable to a second prosecution. A prosecution under Clause 290 we conceive could not be sustained, unless it were shewn to the satisfaction of the Court that there had been sufficient time for the party prosecuted, since his former conviction, or, if he was sentenced to imprisonment, since his release from prison, to take his departure, and there could be no defence against such a prosecution unless the party could prove that he had been making preparations to depart, and that the time had not been sufficient, or that his departure had been prevented by some impediment which it was not in his power to remove or overcome. We apprehend that with respect to persons in the circumstances described in Clause 289 the power of deportation given to the Indian Government by Section 104 of the Act 53, Geo. III. Cap. 155 is still left to the Goverment.

CHAPTER XVII.

OF OFFENCES RELATING TO THE PRESS.

277. It is explained in the Note to this Chapter that the penal provisions contained in it are taken from the Indian Press Act No. XI. of 1835.

278. Mr. Norton has taken occasion to comment at some length upon the Act here referred to, observing that "there is the less reason "for considering such remarks impertinent, as this law is in a manner "engrafted into this Code," "and it may, at all events, answer an "useful object to call the attention of Government to the necessity of its "revision." We do not consider ourselves called upon to follow Mr. Norton in this digression, as he himself terms it. But his remarks may be found worthy of attention should the Government find it expedient to review the Press Law.

CHAPTER XX.

OF OFFENCES RELATING TO DOCUMENTS.

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279. "Forgery" is defined in the first Clause of this Chapter (441.) Afterwards provision is made for the *Offence* of "forgery," first, as regards *any document;* 2dly, as regards any document which is or purports to be a *valuable security;* 3rdly, when it is committed for the purpose of *cheating;* 4thly, when it is committed for the purpose of *harming the reputation* of any party. The same Clauses provide for the offence of "using as genuine" documents known to have been "forged" or "falsified by forgery," which terms as applied to documents are explained in Clause 442. The terms "document" and "valuable security" are explained in Clauses 21 and 22.

Clause 443
444.
445.
446

280. The definition of "Forgery," in Clause 441, consists of five articles, all which relate to documents, except the fifth, which relates to something which is not a document or part of a document, because it contains no word, or letter, or mark, in handwriting, or meant to appear so, but which is intended to become a document by the addition of handwriting. Though the fabrication of this inchoate document is a forgery, it is not an offence in itself; but whoever has such a thing in his possession intending that it may be made a document purporting to be a valuable security, is guilty of an offence under Clause 450.

450.

281. The first Article declares that a person commits forgery who makes or marks any document so that it may be believed that it was made or marked by some other person, or at some other time, or by some authority by which it was not made or marked. By the second a person commits forgery who voluntarily omits to insert in a document which he has engaged to make by the authority or according to the direction of another, any thing which he is directed to insert in it, intending it to be believed that the document is made according to the direction of that other. By the third it is forgery to cancel a document intending it to be believed that the cancellation was made by another person, or at another time, or by some authority by which it was not made. By the fourth it is forgery to cause any part of a document or any mark for identifying or authenticating a document to disappear,

intending it to be believed that such part or mark never existed, or was caused to disappear by another person, and at another time, or by some authority by which it was not caused to disappear.

282. It is an *offence* to commit forgery in any of these ways with intent to injure any party, or to render any illegal act easier or safer, or to obtain employment for any person in public or private service. It is an aggravation when the document forged or falsified by forgery purports to be a valuable security. It is an aggravation also when the object is to cheat, or to harm the reputation of any person. For forgery without any of these aggravations, or using a "forged document," or a "document falsified by forgery" as genuine, the punishment is imprisonment of either description, which may extend to two years, or fine or both. When the document purports to be a valuable security, the punishment is imprisonment, with or without fine, for 14 years as the maximum and two years as the minimum; when the object is to cheat, the maximum is seven years and the minimum one year; when it is to harm the reputation of any person, the maximum is three years and the minimum six months.

Clause 441.

444

445. 446.

283. Mr. Hudleston says, "To this laboured, wordy definition "(Clause 441) I prefer the English one of forgery, namely, 'the "'fraudulent making or alteration of a writing to the prejudice of "'another man's right.'" This is the definition given by Blackstone. The definition of the English Criminal Law Commissioners is as follows, "Forgery consists in the false and fraudulent making of an instrument "with intent to prejudice any public or private right." They say in the 5th Report—"The general definition of the offence is in substance "that which is given by Sir W. Blackstone, which we have adopted, and "which is recommended by its conciseness, accuracy, and generality. "We have, however, for the sake of comparison, stated those of several "other very eminent Judges. We have also introduced various articles for "the purpose of more particularly defining and explaining the nature and "extent of the offence." It will be observed that the definition of the Criminal Law Commissioners omits the word "alteration" which is contained in that of Blackstone, and adds the word "public" in connection with right. Sir E. H. East's definition, cited in the 5th Report, explains that a "false making" is to be understood as "including every alteration "of or addition to a true instrument," and so, it appears, the Commissioners intend the word "making" to be understood in their definition.

Vol IV, p 247.

Digest, Chap XXI, Art. 1.

p 67

Art 6.

284. It is to be observed that the Articles in Chapter XXI. of the Digest, under the head of "Forgery and other offences connected "therewith", comprise a part only of the forgeries recognized and

provided for by the law of England The English Criminal Law
p 67 Commissioners in their 5th Report observed that " there can be no doubt " that the crime of forgery is capable of being defined and expressed in a " manner much more general and concise than that in which it now " exists according to the law of England," but that they " had not " considered themselves warranted in making alterations which would " amount to an entire reconstruction of this branch of the law." In preparing the Digest under the above heading which is contained in the same Report, their plan was this, " after defining the general rules " applicable to the common law offence of forgery, they proceeded to " arrange and classify the several statutory enactments relating to the
68 " offence." The Digest thus framed they described as consisting, " so " far as the Statute law is concerned, of a great variety of special " provisions left unrepealed by the Statute 11th of King George IV. and " 1st of King William IV., Chapter 66, (the Forgery Consolidation " Act), of the larger number of the Clauses of the last mentioned Act, " and of the different forgery enactments passed since that Act." The Commissioners abandoned this arrangement in preparing the general Digest of the law submitted with their 7th Report, and excluding from the Chapter of Forgery almost all the special statutory enactments, distributed those enactments in different Chapters under the heads denoting the subjects with which they are respectively connected. Thus the
Digest, 7th Report provision relating to the forgery of written instruments of justice appears
ch V S 5 under the head of " offences tending to defeat or pervert justice." The offence of forging a transfer of public stock, and other cognate offences,
ch VIII S 1 come under " offences relating to public chattels, funds, &c." The
Ibid S 6 forging of stamps is provided for under " offences relating to the stamp " duties;" the forging of registers of baptisms, &c. under the head of
ch X " offences relating to public records;" the forging of Exchequer bills,
ch XIV S 2 promissory notes, bills of exchange, &c., under " offences relating to negotiable securities;" and so forth

285. The Articles introduced in the Digest to explain the general definition of forgery are more numerous than those of which Clause 441 consists, which Mr. Hudleston characterizes as " laboured and wordy." The latter we think comprehend all that is essential in the former, and they appear to us to be expressed with clearness and precision. The only question we have remarked that seems to require notice as implying that a part of the definition in the Code is too comprehensive, refers to the second Article of Clause 441, according to which a person commits forgery who having engaged to make a document by the authority and according to the direction of another voluntarily omits to insert something he was directed by that other to insert, intending

it to be believed that it is made as directed. The question is put thus —" A is engaged by B to collect certain dues, and is directed to make a " faithful account of his collections. A makes a false account, omitting " to insert all. Has A committed forgery?"

286. We apprehend that this case does not fall within the definition, which we conceive refers to a document made by one person as by the authority and according to the direction of another, and intended to pass as the act of that other, not to a document made by one man by the order of another for the use of that other. We are inclined to think, however, that the Article in question, as it stands, may be construed to comprehend more than we presume was meant, and we consider it advisable to introduce words restricting it to documents intended to be taken and received as the very acts of the party who directed them to be made. We would therefore insert after the words " according to the direction of another", the words " which document is intended to pass as the act of that other," and at the end the words " and is entirely his act."

287. Generally in the provisions relating to forgery the term " written instrument" is used in the Digest where " document" is used in this Chapter of the Code. In the Note upon the definition of the term " instrument" in the 5th Report of the English Criminal Law Commissioners it is observed that " as applied to writing generally the term " must mean a writing constructed for the immediate purpose of effect- " ing some moral result, such as belief or knowledge; in a legal and " technical sense it means a writing by which some such moral result is " to be effected for a legal purpose." In the Report it is explained that " as regards the subject matter, the offence (of forgery) extends to " every writing used for the purpose of authentication." The meaning which is attributed to the term instrument as applied to writing generally, we conceive, is what is intended by the term " document" when it is used absolutely in the Code. This wide signification is however restricted by the determinate application of the term in the penal provisions of the Chapter under consideration.

288. The Digest differs from the Code in declaring that the term " written" shall be deemed to apply " whether the words or figures of " the instrument or any of them be expressed by means of writing, " printing or otherwise ;" whereas the Code limits the term " document" to matter which is wholly or partly in handwriting or which is meant to appear to be in handwriting : but while by the Code handwriting is thus made essential to the constitution of a document, " a single word or a

Clause 21

"single letter or significant mark in handwriting is sufficient to make "the whole of the matter connected therewith a document."

para 88

289. In our first Report we observed that it might be expedient to place the definition of document in the Chapter we are now considering, for which it seemed to have been framed. We referred to the restriction in regard to handwriting, and to the objection taken to it as arbitrarily assigning a meaning to the word short of what it has in the popular sense. We thought that this restriction was intended to meet the penal provisions regarding forgery, and it seemed to us that consistently with this view the definition might be extended so as to include papers not in writing authenticated by a seal or stamp instead of a written signature, as suggested by Mr. Greenhill. It is certain that the definition was originally intended to have place in this Chapter, in which it actually appeared in the first impression of the Code, but being referred to also in the definition of cheating in the Chapter "of offences against property" it was afterwards properly transferred to its present position in the Chapter of "General Explanations." Having now considered the definition more particularly in connection with the penal provisions of this Chapter and with the Clauses relating to cheating in Chapter XIX., to which exclusively it appears to have reference, we are led to the conclusion that the alteration we formerly contemplated is not required practically. In the definition of cheating in Clause 392, the word document is used as it is used in Clause 444 in this Chapter in connection with the term "valuable security," which as defined in Clause 22, denotes a class of documents that we believe are always, or almost always, so made as to be within the definition in Clause 21, that is to say, documents which are wholly or partly in writing, or which are authenticated by a written signature of some kind. We do not recollect any examples of documents made without handwriting in any part, and authenticated merely by a seal or stamp instead of a written signature.

Chapter XIX Clause 392

290. Of Clause 443 Mr. Hudleston says, "Offences very different "in criminality are here brought together, and the special provision for "any of them I consider unnecessary." Mr. A. D. Campbell expresses his concurrence in this remark. We cannot suppose that Mr. Hudleston means that it is unnecessary to provide for forgery committed with any such intention as is expressed in this Clause; but what he does mean is not clear, and Mr. Campbell does not elucidate it. It seems to us that forgery committed with any such object as is here specified, ought to be punished, and that the range of punishment prescribed affords sufficient room for the exercise of discretion on the part of the Judge in apportioning the penalty to the degree of criminality which attaches to the

offender according to the circumstances of each case. At first sight it would seem that the general definition of forgery in the Digest which we have cited above does not go to the full extent of this Clause, but when the explanations of the Commissioners are considered, it may be thought that there is not much difference. For the offence of forgery, it is said, " extends to every writing used for the purpose of authenti- " cation, and a certificate by which an Officer or other authorized " person assures others of the truth of any fact" is mentioned as an example of such writing. Again a case is cited in which " it was " determined that the crime extended to all written instruments by the " forgery of which a party might be prejudiced," and in Article 4, Chapter XXI. of the Digest it is laid down that " an instrument shall " be deemed to be *falsely* made when it is not really the instrument " or mean of authentication for which it is intended to be taken; but is " *fraudulently* made with intent to obtain that credit which would be due " to it if it were genuine." Under these explanations the definition in the Digest may perhaps be construed to include, as Clause 443 does specifically, the forgery of a certificate " with the intention of obtaining " employment for any person," also forgery committed with the intention of facilitating " any illegal act," that is to say, according to the definition in Clause 28, any act " which is an offence or which is contrary to any " direction of the law, or which furnishes ground for a civil action," as well as " forgery committed with the intention of causing any injury to " any party."

291. With respect to Clauses 444, and 445, Mr. Sharkey observes that " while they make a difference in punishment they do not discri- " minate the particular classes of forgeries intended by them respectively; " in the former the term valuable security only being used, and the " latter speaking merely of forgeries for cheating, while the Article " ' of cheating' contemplates forgeries of equal value with those referred " to in Clause 444 of the present Chapter; and indeed the object of all " forgeries being to cheat, these different terms alone could never be a " sufficient distinction, while a distinction is absolutely necessary." For the forgery of any document not a valuable security and not intended to be used for cheating, the offender is liable to punishment under Clause 443; if the document was intended to be used or was used for the purpose of cheating he is liable to enhanced punishment under Clause 445; and to a further enhancement under Clause 444 if the document be a valuable security. This all seems to be sufficiently clear. The case put in the illustration (*a*) of Clause 392, as an example of cheating by means of a forged bill of exchange, that is a document classed as a " valuable security," might be put also under Clause 443 as an example of using a

" Vide illustration " a" of Clause 392 of the Article 'Cheating.' "

forged document as genuine with the intention of injuring any party; under Clause 444 as an example of so using a forged *valuable security* with the same intention; and under Clause 445 of so using a forged document with the intention of cheating; but practically as the minor offence merges in the major the offender would be prosecuted under Clause 444.

292. Mr. Sharkey, who has written at some length upon the subject of forgery, among other things observes that the principle upon which the penalties for this offence are proposed does not appear. He says, "There should be some certain data for regulating the measure of "punishment, and a more uniform and fair one than the amount of the "property attempted to be defrauded I do not think there can be."

Clauses 444 and 449

293. Mr. J. F. Thomas appears to hold a similar opinion as to the propriety of making the value of the property affected by a forgery a standard for determining the punishment. Referring to Clause 444 relating to the forgery of a valuable security and to Clause 449 relating to the possession of a forged document of that description, he says, "These Clauses, &c., would render any party who had in his possession "a forged receipt to the value of five rupees or other trifling sum, liable "to two years imprisonment at the least. I think, in such cases of "frequent occurrence, a penalty to this extent altogether uncalled for "by the wants of society. If such document were even uttered as "genuine, a fine of ten times the amount, commutable to imprisonment "for a few months, would probably be sufficient to check the offence in "these trifling cases, and afford ample security to property, especially if "that fine, or a part of it, were made over to the party intended to be "defrauded."

294. As to what is here said of possessing a forged document, it is to be observed that the mere possession of the document is not punishable under Clause 449 unless the possessor knows it to be forged and intends or knows it to be likely that it may be used as genuine, a knowledge and intention which make the possession justly penal. The having a forged document in possession appears to be punishable by the law of England only when the document is a bank note or bank bill of exchange or bank post bill. The possession of a forged document of that description without lawful excuse, the proof whereof lies on the accused, is made highly criminal. The English Commissioners observe that "this law inverts the general principle of criminal jurisprudence "that a man is presumed to be innocent till his guilt be proved.". The provisions in the Code do not appear to be liable to this reproach since they require proof of a certain guilty intention. They are confined to forged

Digest Chapter XIV. Section 2, Art. 6.

5th Report p 67.

documents representing valuable securities (Clause 449) or to what are intended to be made such, (Clause 450), as blank bank notes marked by forgery, the possession of which is punishable by the law of England. Act above

295. Mr. Thomas, in whose opinion Mr. Hudleston concurs, has adverted only to cases in which the value of the property affected by the forgery of a valuable security is inconsiderable. These gentlemen do not say whether they would follow the same principle in cases of magnitude, as where a Lac of Rupees is concerned. We may take it for granted that in such cases they would not recommend "a fine of ten "times the amount," but what they would recommend is left to conjecture.

296. Mr. Sharkey refers to the provisions regarding "Mischief" as recognizing the principle of value. We remarked in our first Report that "in laying down the punishment for different degrees of the "offence of mischief the gradation observed refers to the amount of "loss sustained, a mode of distinction not admitted in estimating the "degrees of criminality in other offences against property." It is to be considered however that the reference to value in cases of that description is not observed for the purpose of distinction where the loss amounts to more than 100 Rupees. We are inclined to agree with Mr. Thomas that for the forgery of a receipt for 5 Rupees or other trifling sum, the minimum punishment under Clause 444 of imprisonment for two years is more severe than such cases call for. Either the minimum might be omitted as we have proposed with regard to perjury; or it might be reduced to imprisonment for one year which is the minimum fixed in the Digest of the English Criminal Law; or the principle of value might be adopted to the extent that it is observed in the provisions regarding mischief modified as proposed in our first Report, making the forgery of a valuable security where the amount is less than 100 Rupees punishable with imprisonment which may extend to two years, or fine, or both, and when the amount is 100 Rupees or more with the penalty prescribed in Clause 444, and modifying Clause 449 in like manner. So with respect to Clause 445 either the minimum might be omitted, or the Clause modified on the same principle, confining the punishment, for cases in which the amount is less than 100 Rupees, to imprisonment for one year. We would recommend that the minimum be omitted in both these Clauses. We would omit the minimum also in Clause 446. Clauses 400 to 403 p 608

297. Mr. Greenhill asks "under which Clause does forging a will "come?" it does not appear to come under 'valuable security' as the

"destruction and concealment of one and the other are provided for "separately." Notwithstanding this pertinent observation, we are of opinion that the forgery of a will was intended to come under Clause 444; a will, that is the last will and testament of a person deceased, being considered a valuable security under the definition in Clause 22, as "a document whereby a legal right is created." We observe that in the first impression of the Code the word "will" was inserted in the Clause corresponding to Clause 444, together with "valuable security," seemingly as signifying a thing distinct, and that on the revision of the Code when it was put into its present state, that word was struck out, apparently because it was thought to be included in the term "valuable security." With respect to the separate provisions for the destruction and concealment of a will, and for the destruction and concealment of a valuable security, from which Mr. Greenhill infers that a will is not a valuable security, we understand merely that a will is singled out as the only kind of valuable security, the destruction or concealment of which it is deemed fitting to punish with the same punishment as the forgery of it. And there is a special reason for this distinction of a will from other valuable securities, as there is a chance of such a document falling into the hands of one whose interest it may be, to a greater degree than can apply to any other document, to suppress it; for example when one expecting to be the heir, being in the house of the Testator at the time of his decease in circumstances which give him access to his papers, finds among them a will by which he is disinherited; —the temptation to destroy would be great, the act of destruction easy, and the risk of legal conviction small. It appears to us however that as a will can only become a valuable security by the death of the Testator, the Clause relating to the forgery of valuable securities would not be generally applicable. It would not apply for instance to the case stated in the illustration (*g*) under Clause 441. We are of opinion therefore that it is expedient to make Clause 444 applicable specially by introducing the words "or a will" after the words "a valuable security" in both the third and the fifth line.

Clauses 451 and 452

298. While for the destruction or concealment of a will we do not think the punishment authorized by Clause 451, of imprisonment which may extend to 14 years, excessive, we are inclined to agree with the Sudder Court, North Western Provinces, and with Mr. Pyne of the Bombay Sudder Court, in thinking that the punishment in Clause 452 for the destruction or concealment of other valuable securities, viz., imprisonment which may extend to three years, may be found inadequate. Mr. Pyne in questioning the adequacy of the proposed punishment refers to the unlimited confidence reposed by Native Merchants in their

Gomastahs who by this offence might cause extensive mischief to their employers, and also to the great interest in respect of valuable securities deposited in public offices. We conceive that the punishment should be the same as is provided for the forgery of a document for the purpose of cheating. We think that the same modifications as to the minimum limitation are required in these two Clauses as in Clauses 444 and 445.

299. Mr. Fagan suggests that special provision should be made by a new Clause to follow Clause 452, for the punishment of any public servant fraudulently destroying or defacing or secreting any document, meaning, we presume, any document which has been placed in his charge or entrusted to his keeping as a public servant. We think this suggestion worthy of attention. The offence we suppose is punishable under Clause 145, but the penalty appears inadequate. The punishment for such an offence when the document is not a valuable security we conceive should be the same as in Clause 146, for a public servant preparing a document incorrectly for the purpose of causing injury to any person. When the document is a valuable security, the punishment perhaps should extend to imprisonment up to 14 years, as for forging, or falsifying by forgery, a valuable security.

300. Clause 447 provides for the offence of making "any *apparatus* or *material* for engraving or any seal intended to be used for committing forgery, and Clause 448 provides for having in possession "any *plate* or *material* or *implement* for engraving, or any seal" intended for the same purpose. The punishment proposed is the same as for the offence of forging a valuable security, viz., imprisonment which may extend to 14 years and must not be less than two years, with or without fine. The principle of making a person *thus* accessory to the offence of forgery liable to the punishment of that offence is observed in the corresponding provisions regarding the counterfeiting of stamps (Clauses 218 and 219), it is observed also in the provision regarding the making of a die for counterfeiting coin (Clauses 234 and 235) and partly in that regarding the possession of instruments for coining, &c., (Clause 236). But as in the provisions relating to the counterfeiting of coin there is a distinction between the Queen's and Company's coin and other coin, the offence of counterfeiting the former being liable to a heavier punishment than the offence of counterfeiting the latter, and as there is a similar distinction between the forging of valuable securities and the forging of other documents, so, as there is a corresponding gradation in the punishment of the accessory offence of making the instrument as respects coining, it would seem that there should be a gradation likewise in the accessory offences as respects forging. As the

forgery of a document *not* a valuable security is punishable with imprisonment which may extend to two years, while the forgery of a valuable security is punishable with imprisonment which may extend to 14 years and must *not be less* than two years, it is scarcely consistent to make the preparation of the apparatus for forging the former, the document of less importance, liable to the same punishment as the actual forging of the latter, the document of greater importance. We think that there should be one punishment for these accessory offences as regards forgeries such as are contemplated in Clause 443, and another as regards forgeries such as are contemplated in Clause 444, viz. for the former the punishment specified in Clause 443 and for the latter the punishment specified in Clause 444. We do not perceive why there is a variation in the wording of these Clauses in regard to the subject matter, which, it seems to us, should be described by the same terms in both. The same modification should be made regarding the minimum in these Clauses as shall be made regarding the minimum in Clause 444.

In Clause 447 "Any apparatus or material for engraving"

In Clause 448 "Any plate, material or implement for engraving"

301. The offence described in Clause 453, namely, *a servant of the Post Office* opening a letter or packet containing a document, without authority to do so, differs from that in Clause 388 in as much as the latter involves a fraudulent misappropriation which need not be alleged and proved in order to a conviction under the former. Clause 454 makes it an offence for *any person* to open a fastened letter or packet The provisions seem to be proper It has been suggested that the punishments are too light, but they do not appear so to us

CHAPTER XXI.

OF OFFENCES RELATING TO PROPERTY MARKS.

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302. Mr. Hudleston says he thinks this Chapter an instance of over-legislation; an opinion which we do not understand, for we cannot suppose that he deems the offences which the Chapter provides for venial. Mr. A. D. Campbell, his colleague in the Madras Sudder Court, in reply to his observation remarks as follows—" This Chapter I conclude " refers to *land* marks, as well as to marks for other property, and is " highly necessary, particularly under the ryot-war system, where the " boundaries of fields define the rights of individual ryots, as well as " under the village or zemindary systems, where, in addition to the " boundaries of fields, which the ryot-war system requires, the bounda- " ries of villages, and even of Zemindaries, must be maintained. It is " also, I consider, essential to the Stamp and Post Office Revenue."

303. We apprehend that Mr. Campbell is not right in considering the Chapter applicable to land marks. The words " for the purpose of " distinguishing the property marked from other property" might indeed apply to a land mark, but only by understanding them in a sense inapplicable to other marks. A stone distinguishes A's field from B's in a sense quite different from that in which a brand distinguishes A's sheep from B's. All the offences relate to counterfeiting marks none to removing marks. But the common offence touching land marks is the removal of them. It would seem to be gratuitous to provide for the offence of counterfeiting a land mark.

304. Mr. Norton says, " Of this Chapter, to which I have to offer " no very material objection, I shall merely say, that agreeing in the " expediency of extending criminality to the counterfeiting private " marks on private property, even though no fraud may be thereby " actually effected, yet it appears to me that the '*using*' such counter- " feits as genuine, knowing it *likely* or *intending* that injury may be " effected thereby—or 'for the *purpose* of cheating' is more open to " doubtful construction, and other objections, than the plain law against " the *obtaining* money or goods by false tokens or pretences."

305. But it is obvious to remark that the plain law against the *obtaining* money or goods by false tokens or pretences (which is

Clause 392, et seq

provided for under the head of "cheating") would not answer for the object here intended, the expediency of which Mr. Norton himself acknowledges.

306. Mr. F. N. Maltby observes that this Chapter does not provide any penalty for removing property marks. "The offence," he remarks, "is perhaps included under other heads, but it is under this "that it would naturally be looked for." As respects land marks, this offence is provided for under the head of mischief in Clause 411. As respects marks for distinguishing property such as appear to be intended in this chapter, the removing of them may perhaps come under "mischief" as "causing a change in the property" "by which its value is diminished," or it may come under "criminal trespass" as defined in Clauses 418 and 419 as they stand in the Code; or within the modified definition of trespass proposed in a subsequent part of this Report.

Vide post Chap XXVI

307. We think with Mr. Maltby that it will be more proper to provide generally for the offence of removing, destroying, or defacing property marks, in this Chapter, and we would suggest that the following Clause be added to it accordingly.

"Whoever removes, or destroys, or defaces any property mark, "intending or knowing it to be likely that he may thereby cause injury "to any party, shall be punished with imprisonment of either description "which may extend to one year, or fine, or both"

CHAPTER XXII.

OF THE ILLEGAL PURSUIT OF LEGAL RIGHTS.

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308. It is explained in Note O that "this Chapter is intended to "prevent the enforcing of just claims by means which are so liable to be "abused that, even when used for an honest end, they ought not to be "tolerated. A creditor, for example, who has repeatedly in vain urged "his debtor to pay him, finds that he has no chance of recovering "his money without a troublesome and expensive law suit. He accord-"ingly seizes on property belonging to the debtor, sells it, keeps only "just as much as will satisfy the debt, and sends back the surplus to the "debtor. This act is distinguished from theft by one of the broadest "lines of demarcation which can be found in the Code. It is not a "fraudulent act. It is intended to correct a wrongful distribution of "property, to do what the Courts of Law, if recourse were had to them, "would order to be done. Public feeling would be shocked if such a "creditor were called by the ignominious name of a thief."

"At the same time it cannot be doubted that it would be most "dangerous to allow men to pronounce judgment, however honestly, in "their own favour, and to proceed to take property in execution, for "the purpose of satisfying that judgment. A specific thing, indeed, "which a man has a right to possess, it is no offence in him to take "wherever he finds it." "This license, as it appears to us," say the Commissioners, "must be confined to cases in which specific things are "taken. In such cases the chance of abuse is very small. But where "one thing is due, and another is taken, where a man seizes on another's "furniture in satisfaction of a promissory note, or drives away another's "cattle by way of paying himself for a suit of clothes, the case is very "different." "In such cases, we think it absolutely necessary to provide "a punishment for the illegal pursuit of legal rights."

309. Mr. Norton says, "This whole Chapter appears to me so "obviously open, on the very face of it, to every species of objection "arising from uncertainty of meaning and application, to say nothing "of its utter inexpediency in principle, that I do not feel occasion to "expend much observation upon it. It appears to me to be a law whose "operation depends altogether upon proof of the *belief* and *secret* and

"*future intentions* of a party, whose act, *in itself* gives no proof or "indication of what such belief, or intention, or object may be. If a "man takes property under circumstances proved, which shew he did "so under *color*, or in assertion, *of right*, I should suppose that, under "any law but this, he would be guiltless of *crime*. But under this law "the question of criminality in taking the property under these circum-"stances is made to depend on what he may *happen afterwards* to do "with it—or rather upon *what intention* he may be supposed to have, or "subsequently to form, about the property. So, on the other hand, if he "clearly takes the property *without any color of right* whatever—yet "the criminality of the act is under this law made to depend on the "result of some inquiry, or of some impression on the part of those who "try him, as to what he *intended* at the time to do with the property—"and even upon the intention he may subsequently conceive."

310. These observations appear to us to be by no means just. First, we can scarcely suppose Mr. Norton to mean that if a man takes *not* the specific thing to which he has a right, but something which he considers to be of equal value, in lieu of it, or that, in a case of debt, if A owes B a Thousand Rupees, and B being unable to get the money from him, takes from the possession of A, without his consent, goods of his to the same value, B "would be held guiltless of crime under "any law but this." But as explained in the passage cited above from Note O, "a specific thing which a man has a right to possess, it is no "offence in him (under this law) to take wherever he finds it" "He "may commit other offences in order to take it. But the mere taking "is no crime at all."

311. Next, under this law the question of criminality in taking the property is *not* "made to depend on what he (the party taking) may "happen afterwards to do with it." It depends simply on the intention with which he took it, as evidenced either by his expression at the time, or by the manner and circumstances of the taking, or by both together, as in all other cases in which the intention or animus determines the question of guilt or innocence.

312. Under Clause 460 a man taking property under such circumstances that, if his intention were fraudulent, he would be guilty of theft, escapes from the imputation of that crime, if by the evidence it appears that he took the property, not fraudulently but in good faith, in order to obtain summary satisfaction of a debt, but he is amenable to the law for pursuing his right in an unlawful manner. As the ordinary discovery of the animus furandi is where the party commits the fact clandestinely,

Russell 2, p. 96

or upon its being laid to his charge denies it: so, to apply with some variation words used originally to distinguish trespass from theft, if a man takes away the goods of another openly before him or other persons, otherwise than by apparent robbery, this carries with it an evidence negativing fraudulent intention, because done openly in the presence of the owner, or of other persons who are known to the owner; and this negative evidence will be strong where a person having possessed himself of the goods of another, avows the fact before he is questioned, or if at the time of taking the goods or before he is questioned he declares his object to be the recovery of a debt due to him by the sale of them, and his intention to return any surplus there may be from the proceeds of the sale, and if his acts correspond with such declaration. Again, it can only be discovered by means " of some inquiry" such as is always made before a man is put upon his trial for any offence, whether the property was taken " without any color of right," and where this appears, and where the taking appears to have been clandestine, and concealment to have been practised subsequently, there will be a strong presumption of a fraudulent intention such as will bring the taking under the definition of theft. It is obvious to remark that where there is not " a color of right" in the taking the plea of " good faith" must be excluded, so that such a case could not be brought under Clause 460.

313. By Clause 461, although it may appear that property was taken at first in good faith without a fraudulent intention for the purpose merely of enabling the party who took it to recover a debt, yet if the whole or any part of it is *kept* fraudulently, the party so keeping it is made liable to the same punishment as if the taking had been fraudulent. This is the case which Mr. Norton appears to allude to as one in which the criminality appears to depend " upon the intention " he (the party taking the property) may subsequently conceive." We can see no objection to the provision. The party is punished not for his first offence, the *taking*, in which there was no fraudulent intention, but for the subsequent distinct offence of *retaining*, in which there is a fraudulent intention, a retaining with the intention of causing thereby a wrongful gain to one party, and a wrongful loss to another party from whom the property is kept.

314. Of " the utter inexpediency on principle" which Mr. Norton imputes to the whole Chapter, we can only say, as generally, that we are unable to perceive any reason for the imputation.

315. Mr. Giberne, a Judge of the Bombay Sudder Court, observes that this Chapter is much required. Mr. Bannerman, a Judge of the

Madras Presidency, says " such cases," that is cases comprehended by the provisions of this Chapter, " form a great portion of the wrong " which goes unredressed."

316. Mr. Greenhill puts the following question—" A lends B his " horse, owing B money, B refuses to return the horse till paid. Under " what Clause does this come? B does not take the horse from A's " possession in the manner punishable by the letter of this Clause. It " does not tally with any of the illustrations of Chapter XIX., and it " does not come under the head of criminal breach of trust, because it is " not fraudulent "

317 The question here is, would A be guilty of the theft under the circumstances stated if his intention were fraudulent? which we think may be answered by help of the illustration (*w*) under Clause 363. From this illustration it may be inferred that if A took the horse lent to him by B, fraudulently, intending to carry it away altogether, or to sell it and appropriate the price of it, he would be guilty of theft; and if so it follows that taking the horse intending at the time, not to return it, as implicitly promised by his receiving it on loan from B, but to appropriate it for the satisfaction of the debt due to him by B, he is guilty of the offence defined in Clause 460

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CHAPTER XXIII.

OF THE CRIMINAL BREACH OF CONTRACTS OF SERVICE.

318. In Note P. upon this Chapter, the Commissioners say, " We " agree with the great body of Jurists in thinking that, in general, a " mere breach of contract ought not to be an offence, but only to be " the subject of a civil action."

" To this general rule there are however some exceptions. Some " breaches of contract are very likely to cause evil such as no damages, " or only very high damages, can repair, and are also very likely to be " committed by persons from whom it is exceedingly improbable that " any damages can be obtained. Such breaches of contract are, we " conceive, proper subjects for penal legislation."

319. The Commissioners observe that the law they have framed on this subject applies only to cases in which the contract is lawful. " The " traveller, therefore, who resorts to the highly culpable, though, we " fear, too common practice of unlawfully compelling persons against " their will to carry his palanquin or his baggage will not be protected " by it. If they quit him, it is what they have a legal right to do, " nor will they be punishable whatever may be the consequence of " their desertion."

320. Clause 463 contains the general law on the subject. Clause 464 contains a special provision for the punishment of seamen in merchant vessels for breaches of the contract by which they are bound to their employers. " The insubordination of seamen during a voyage," it is observed, " often produces fatal consequences." " Their desertion " in port may cause evils such as very large damages only could repair. " But they are utterly unable to pay any damages for which it would be " worth while to sue." Clause 465 provides specially for the punishment of persons engaged to take care of infants, of the sick, and of the helpless, who omit to discharge their duty. The reason of this special provision is that " the misery and distress which their neglect may cause " is such as the largest pecuniary payment would not repair," and that " they generally come from the lower ranks of life, and would be unable " to pay any thing."

321. Sir R. Comyn remarks, that this Chapter introduces a novelty in our criminal jurisprudence, but the reasons for it, in Note P., he considers satisfactory.

322. Of the many other persons who have offered remarks on this Chapter, all but Mr. Norton appear to approve of it as far as it goes. Mr. Norton says, " There may be no sound objection to the rendering " *some sorts* of contract of service criminal, but I conceive those particu- " lar breaches of service should be specifically designated, and that a law " making *all sorts* of breaches of contract to *convey* persons or property, " all sorts of illegal *disobedience* or leaving of a vessel *by a seaman, all* " sorts of omission in attendance or *supplying wants of helpless* persons " by their servants, criminal, and punishable by various degrees of " imprisonment, or fine, or both, is carried to a preposterous extent."

323. On the other hand many think the law ought to be more comprehensive. Mr. A. D. Campbell, Judge of the Madras Sudder Court, says, " For the reasons given by the Officers in the interior, I would " extend this Chapter to the punishment of servants quitting their " masters without giving a month's previous warning. It is a great " evil to individuals, and when troops are ordered suddenly to march, " becomes a public evil."

324. The Sudder Court North Western Provinces " think that " some provision might justly be made to meet the contingency of " servants quitting their master's service without notice, while on " a march or during a journey—their sudden departure on such " occasions must almost necessarily involve much embarrassment and " inconvenience."

325. Mr. Giberne, Judge of the Bombay Sudder Court, says, " considering the state of society in the East, I think a law is required " to protect both masters and servants. Often are the former put to " painful inconvenience and annoyance by servants refusing to go to a " distant station, on the very eve of departure, although they have " received sufficient notice and were before inclined to go. Servants " on the other hand may be turned off, at a moment's warning. I " would have recommended that a month's pay be given, or a fine " imposed to that amount."

326. Mr. F. Lewin observes that " whole sets of servants constantly " desert young Officers after a few marches to join Regiments, after they " have cheated him out of all his ready cash; and the misconduct of

"servants generally to ladies is often just as distressing as that of "palanquin bearers," (referred to by the Commissioners by way of illustration) "when they are unprotected." Mr. Blanc and Mr. E. C. Monckton likewise strongly insist upon the evil arising from servants engaged for a journey or a march suddenly deserting their employers at the time of setting out or on the road, as rendering such a breach of contract a proper subject for penal legislation, on the ground stated in the 2d para. of Note P.

327. Several of the Gentlemen who argue for an extension of Clause 463, or an additional provision to include servants deserting their employers in breach of an engagement to proceed with them on a journey, would go further than this, to the length of punishing every menial servant who before the expiration of the term for which he is hired, or without a certain notice, quits his employer, which is authorized by Section 6, Regulation VII. of 1819 of the Bengal Code, and some to the length of punishing such servants generally for omission or negligent performance of their duty, which is authorized by Section 18, Regulation XII. of 1827 of the Bombay Code and by the Police Regulations of Calcutta and Madras. A Native Officer, *v.* Sreenavasiah, Naib Sherishtadar of Chingleput in the Presidency of Madras, in reference to the remark of the Commissioners that it does not appear that good masters are in much danger of being voluntarily deserted by their menial servants, observes that though this may be true as regards European masters, it is not the case with Natives, where each man must be served by the lower orders of his own caste; meaning we conceive that this limitation to one class narrows the market so much as to make their servants careless of pleasing their masters as being sure of employment.

328. With reference to Mr. Norton's censure we have to observe, that the proposed law does *not* "make *all sorts* of breaches of contract "to convey persons or property criminal," but only a breach of such a contract by a person intending or knowing it to be likely that his illegal omission to fulfil it will cause injury to some person. Again with respect to the Clause regarding seamen, it appears to us that the terms "*illegally* leaving a vessel," and "*illegal* disobedience of orders," are sufficiently definite, and that there cannot be many *sorts* of illegal leaving or illegal disobedience to perplex a Magistrate or Judge who might be called upon to apply the law.

329. We are inclined to agree with those who consider that the extension of Clause 463 to menial servants engaged for a journey is

recommended by the same reasons as induced the Commissioners to propose the provisions now contained in it. We are not prepared to punish as a criminal every menial servant who quits his employer without a certain notice upon the expiration of the term for which he is hired, under ordinary circumstances. But we conceive that Clause 465 may be improved in one respect. It seems, as it stands, not to be applicable to any but those servants who have contracted specifically to attend upon the sick, insane, &c, but we think it should be made to apply to servants who are or ought to be in attendance upon a sick or insane master, though they may have only contracted with him in the ordinary way, while he was of sound body and mind, and to servants, whether engaged specifically for the purpose or not, who by the lawful command of their employers have been ordered to take care of young children and have not objected to do so.

330. Sir R. Comyn considers the provision contained in Clause 464 for offences committed by seamen inadequate to enforce subordination on board a ship, and observes that the leniency of it is a contrast to the severity of existing Acts of Parliament relating to Shipping. Acts of insubordination, especially when accompanied with violence, he thinks ought to be viewed in a more serious light than criminal breaches of contract. He suggests that there should be a separate Chapter for offences on board ship. We think it proper to mention the views thus expressed by Sir R. Comyn for the consideration of Government, but we are not prepared to recommend any alteration in the Clause, which of course would not prevent a seaman from being subject to punishment for any act or omission which is an offence

CHAPTER XXIV

OF OFFENCES RELATING TO MARRIAGE.

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331. By this Chapter it is made an offence in a man by deceit to cause a woman to believe that she is lawfully married to him and in that belief to cohabit with him, when the marriage is not lawful. It is an offence also in a woman so to deceive a man. Here the essence of the offence is the deceit operating injury, but as the injury is much greater when the woman is the sufferer, the punishment is made much more severe in the former case than in the latter. Again it is made an offence for any man or woman with any fraudulent intention to go through the ceremony of being married knowing that such marriage is not lawful. Here there may be no deceit as between the parties, but there must be an intention to defraud, within the meaning of Clause 16, as when the pretence of a lawful marriage may enable the parties to obtain possession of property settled to come to one of them on marriage. Clause 466. 467 468.

332. Under these provisions bigamy is punishable, where the law of the parties forbids a second marriage while the first is undissolved, but only when a deception is practised, or fraud is intended. "We do not," say the Authors of the Code, "at present propose any law for punishing "a person who, without practising any deception, or intending any fraud, "goes through the forms of a marriage which he knows to be invalid. "The difficulty of framing such a law in this country is great. To make "all classes subject to one law would, evidently, be impossible. If the "law be made dependent on the race, birth-place, or religion of the "offender endless perplexity would arise. Races are mixed; religion "may be changed or dissembled. An East Indian, half English half "Asiatic by blood, may call himself a Mahomedan, or a Hindoo, and "there exists no test by which he can be convicted of deception." Note Q. p 90

333. In not providing for the punishment of bigamy not aggravated by deception or fraud, the Code differs materially from the Law of England as it now stands, but not as it stood before the Reign of James the 1st. On account of this omission the Code has been severely censured, and, as Mr. Norton remarks, "much public abuse has been "expended upon it" Blackstone 4, 163.

331 The Authors of the Code apparently anticipating that its provisions would be regarded as defective on this point, and admitting
Note Q. p 89 that from the deep interest which society has in the sacredness of the matrimonial contract, it may be justifiable to punish those who go through the forms of that contract for the purpose of imposing on the
p 90 public, without deception *between the parties* or any *fraudulent intention*, suggest for the consideration of Government whether, pending inquiry into the various laws of marriage prevailing in India, "it might not be, "on the whole, better to retain the existing law applicable to Christians "in India, objectionable as that law is, than to allow absolute impunity "to bigamy."

335 They consider the English Law objectionable because being "framed less for the purpose of preventing people from injuring each "other than for the purpose of preventing the profanation of a religious "ceremony," "it makes no distinction between bigamy which produces "most frightful suffering, and bigamy which produces no suffering to "individuals," as instanced in the two cases stated in page 89 of the
Note Q. Note.

336. We do not see why Christians should not be made subject to the provisions of this Chapter as it stands, for bigamy aggravated by deception or fraud, by which what is considered objectionable in the English law would be avoided, even should a new provision be introduced retaining the English law, with respect to them, for bigamy without such aggravation

337. The present law applicable to Christians in India is contained in Section 70 of the Statute 9, Geo. IV., Cap. 74 The punishment is transportation for seven years or imprisonment not exceeding two years. The punishment might be confined to imprisonment not exceeding two years, if cases of aggravation were left to be dealt with under the provisions of Clauses 466 to 468. The new provision might run thus— "Whoever, professing the Christian religion, being married, shall marry "any other person during the life of the former husband or wife, "whether the second marriage shall have taken place within the "Territories of the East India Company or elsewhere, shall be punished "with simple imprisonment for a term which may extend to two years, "and shall also be liable to fine." Then might follow the exceptions specified in Section 70 of the said Act.

338. We believe that such a provision would satisfy most of the objectors to this Chapter, who do not find fault with the proposed law

so far as it goes, but find fault with it for not going farther—who think with Mr. Giberne, Judge of the Sudder Court at Bombay, that by this Chapter as it stands "Polygamy is so far allowed to the English in "India that provided no deceit is practised no penalty is enacted for the "crime." Sir R. Comyn and others particularly express assent to the suggestion of applying the existing law relating to bigamy to Christians in India.

339. For ourselves we must say that we do not perceive that the difficulty adverted to by the Authors of the Code as an impediment to a general law for punishing a person who without practising any deception or intending any fraud goes through the forms of a marriage which he *knows to be invalid*, is of more force in this case than in the cases provided for by Clauses 466 to 468, particularly where, as by Clause 468, the guilt of the party depends on his *knowing that he is not lawfully married* by the forms he goes through.

340. We are of opinion that the maximum punishment authorized by Clause 466, viz., imprisonment which may extend to 14 years, is excessive. We would limit it to seven years, the maximum term of transportation under the Statute 9, Geo. IV., Cap. 74. And we would extend the punishment to be awarded under Clause 467 to two years, to correspond with the new provision above suggested.

341. With reference to the minimum fixed by Clause 466, Sir H. Seton puts the following case—"A believing his former wife to be dead "marries B He afterwards discovers that she is alive, but conceals the "fact from B." "Must A," he asks, "be imprisoned for not less than "two years"? Under such circumstances A would no doubt be liable to conviction by the terms of Clause 466, and he must of course be sentenced to punishment accordingly. Under the English Law, A having married a second wife believing his first wife to be dead, but the period of seven years not having passed since he knew she was alive, would be liable to punishment for bigamy, if it appeared she was not dead at the time of the second marriage, but it would be at the discretion of the Judge to pass a light sentence if he thought the case did not call for severity. The case put by Sir H. Seton certainly is one not calling for severity. It may be advisable not to fetter the discretion of the Judge by prescribing a minimum—or it may be reduced to one year.

342. Mr. F. N. Maltby points out what he considers "an impor-"tant omission under the head of offences relating to marriage" that it does not provide for the very serious crime of marrying a party

"without the intelligent consent of the party, or of guardians competent "by the laws of their religion, to act for the party." He mentions a case which had lately occurred, in which "a Hindoo girl of 6 or 7 years "old was left for a few days by the father and mother at the house "of a relation. This relation, without the consent of either party, "married the child to a relation of his own, a man of about 30 years "old."

343. It seems to us that such a case as this amounts to the offence of "kidnapping from lawful guardianship" defined in Clause 354, as it might be alleged that the child had been *conveyed out of the keeping of the lawful guardian* under a *consent obtained by deception or concealment as to the future treatment of the child, for a purpose of injury to the child*, that is for the purpose of marrying her improperly. We conceive that the relation who gave the child in marriage under the circumstances stated would be liable under this law as principal, and the man who married her as an abettor. We are not prepared to recommend a more express provision to punish a party marrying a woman child who is under the age at which the law makes her responsible for her actions, and of course assumes her to be capable of giving an intelligent consent, without the consent of her guardian. When a party marries a woman above that age without her consent, he will probably have done something which will make him liable to punishment under some of the provisions regarding assault, or "wrongful restraint," or "wrongful confinement," or "criminal intimidation."

Clauses 31 and 65

344. Adultery, which is recognized as an offence by the existing laws for the administration of criminal justice in the Company's Courts in all the Presidencies, and for regulating the punishment of which in the Territories under the Presidency of Bombay an Act was lately passed by the Government of India, is not made an offence by this Code. The reasons for omitting it are thus stated in the Note upon the Chapter under consideration.

Act II. 1845.

Note 2, p 90

"We considered whether it would be advisable to provide a "punishment for adultery, and in order to enable ourselves to come to "a right conclusion on this subject we collected facts and opinions from "all the three Presidencies. The opinions differ widely. But as to the "facts there is a remarkable agreement."

"The following positions we consider as fully established, first, that "the existing laws for the punishment of adultery are altogether "inefficacious for the purpose of preventing injured husbands of the

" higher classes from taking the law into their own hands; secondly, " that scarcely any native of the higher classes ever has recourse to the " Courts of law in a case of adultery for redress against either his wife " or her gallant; thirdly, that the husbands who have recourse in cases " of adultery to the Courts of law are generally poor men whose wives " have run away, that these husbands seldom have any delicate feelings " about the intrigue, but think themselves injured by the elopement, " that they consider their wives as useful members of their small house- " holds, that they generally complain not of the wound given to their " affections, not of the stain on their honor, but of the loss of a menial " whom they cannot easily replace, and that generally their principal " object is that the woman may be sent back. The fiction by which " seduction is made the subject of an action in the English Courts is, it " seems, the real gist of most proceedings for adultery in the Mofussil. " The essence of the injury is considered by the sufferer as lying in the " 'per quod servitium amisit.' Where the complainant does not ask to " have his wife again, he generally demands to be reimbursed for the " expences of his marriage."

" These things being established, it seems to us that no advantage " is to be expected from providing a punishment for adultery. The " population seems to be divided into two classes—those whom neither " the existing punishment nor any punishment which we should feel " ourselves justified in proposing will satisfy, and those who consider the " injury produced by adultery as one for which a pecuniary com- " pensation will sufficiently atone. Those whose feelings of honor are " painfully affected by the infidelity of their wives will not apply to the " tribunals at all. Those whose feelings are less delicate will be " satisfied by a payment of money. Under such circumstances we think " it best to treat adultery merely as a civil injury."

" Some who admit that the penal law now existing on this subject is " in practice of little or no use, yet think that the Code ought to contain " a provision against adultery. They think that such a provision, though " inefficacious for the repressing of vice, would be creditable to the " Indian Government, and that by omitting such a provision we should " give a sanction to immorality. They say, and we believe with truth, " that the higher class of Natives consider the existing penal law on the " subject as far too lenient, and are unable to understand on what principle " adultery is treated with more tenderness than forgery or perjury."

345. Upon these points the Commissioners observe as follows: " That some classes of the Natives of India disapprove of the lenity with

"which adultery is now punished we fully believe, but this in our "opinion is a strong argument against punishing adultery at all. There "are only two courses which in our opinion can properly be followed "with respect to this and other great immoralities. They ought to be "punished very severely, or they ought not to be punished at all. The "circumstance that they are left altogether unpunished does not prove "that the Legislature does not regard them with disapprobation. But "when they are made punishable the degree of severity of the punish-"ment will always be considered as indicating the degree of disappro-"bation with which the Legislature regards them. We have no doubt "that the Natives would be far less shocked by the total silence of the "penal law touching adultery than by seeing an adulterer sent to "prison for a few months while a coiner is imprisoned for fourteen "years."

"Nobody," they proceed, "proposes that adultery should be punished "with a severity at all proportioned to the misery which it produces in "cases where there is strong affection and a quick sensibility to family "honor. We apprehend that among the higher classes in this country "nothing short of death would be considered as an expiation for such "a wrong. In such a state of society we think it far better that the "law should inflict no punishment, than that it should inflict a punish-"ment which would be regarded as absurdly and immorally lenient."

346. Lastly, the Commissioners advert to "some peculiarities in "the state of society in this country which they observe may well lead a "humane man to pause before he determines to punish the infidelity of "wives. The condition of women of this country is unhappily very "different from that of the women of England and France. They are "married while still children. They are often neglected for other wives "while still young. They share the attentions of a husband with "several rivals. To make laws for punishing the inconstancy of the "wife while the law admits the privilege of the husband to fill his "zenana with women, is a course which we are most reluctant to "adopt."

Letter 18th Feby 1840

347. Colonel Sleeman opposes the reasoning of the Commissioners on this subject. The backwardness of the Natives to have recourse to the Courts for redress in cases of adultery he asserts "arises from the "utter hopelessness on their part of ever getting a conviction in our "Courts upon any evidence that such cases admit of," that is to say in Courts in which the Mahomedan Law is observed. "The rich man," he proceeds, "not only feels the assurance that he could not get a conviction

" but dreads the disgrace of appearing publicly in one Court after
" another, to prove, by numerous witnesses, male and female, his own
" shame and his wife's dishonor. He has recourse to poison secretly or
" with his wife's consent; and she will generally rather take it than be
" turned out into the streets a degraded outcast. The seducer escapes
" with impunity—he suffers nothing, while his poor victim suffers all
" that human nature is capable of enduring. Many instances of this
" have come within my own knowledge. The silence of the Penal Code
" will give still greater impunity to the seducer, while their victims will
" in three cases out of four be murdered or driven to commit suicide.
" Where husbands are in the habit of poisoning their guilty wives from
" the want of legal means of redress, they will sometimes poison those
" who are suspected upon insufficient grounds, and the innocent will
" suffer."

" At present I believe no Magistrate could hope to get a conviction
" in a Court of Sessions against any person charged with adultery under
" Regulation XVII. of 1817 in one case out of a hundred that might
" take place in his district. His only resource would be in Regulation
" VII. of 1819, which authorises him to punish a person convicted of
" enticing or taking away a wife or unmarried daughter for the purpose
" of rendering her a prostitute. But this law which provides for another
" class (pimps) can seldom be so strained as to reach this class of
" offender, the seducer, and few Magistrates feel disposed so to strain it
" for the purpose. That men do not seek redress in our Courts for
" the seduction of their wives and daughters arises from the defects of
" the law, and these defects may easily be remedied. It is an error to
" suppose that the Natives of India want a heavier sentence—all they
" want is a fair chance of conviction, and such a measure of punishment
" as shall make it appear that their rulers think the crime a serious one,
" and are disposed to protect them from it."

" Sometimes the poorest persons will refuse pecuniary compensa-
" tions; but generally they will be glad to get what the heads of their
" cast or circle of society may consider sufficient to defray the expences
" of a second marriage. They dare not live in adultery—they would be
" outcasts if they did—they must be married according to the forms of
" their cast, and it is reasonable that the seducer of the wife should be
" made to defray these expenses for the injured husband. The rich will
" of course always refuse pecuniary compensation, and for the same
" reason that they would never prosecute the seducer in a Civil Court.
" The poor could never afford so to prosecute in such a Court; and, as
" I have said, the silence of the Penal Code would be a solemn pledge of

"impunity to the guilty seducer, under an efficient Government like "ours that can prevent the husband and father from revenging them-"selves except upon the females."

Letter 6th March 1840.

348. In support of his opinion as to the causes which deter the people from applying to our Courts in general, Colonel Sleeman observes that in the Saugor and Nerbudda Territories where those causes did not exist he did not find that the injured husband was unwilling to prosecute the seducer of his wife. "In the Nerbudda Territories," he says, "the Regulations were not in force, and the husband had to prosecute "the seducer of his wife in our Court only, that of the European Officer "in charge of the District, and in that Court there was no Mahommedan "Law Officer, or Mahommedan Law of Evidence to be considered. "The maximum of punishment amounted to two years imprisonment, or "fine, or both." He infers that "when the impediments to redress of "such wrongs shall be removed in the same manner in all other parts of "India by diminishing the punishment to such a minimum measure as "the Magistrate's Court may be competent to award, and by doing away "with the necessity of a Mahommedan Law Officer in such trials, the "people will in all parts be found ready to seek redress through the "constituted tribunals, and the seducer will then, and not till then, "share danger with the seduced."

349. The following are the observations of the Sudder Court North Western Provinces on this Chapter. "With reference to the argu-"ments of the Commissioners and to the difficulty so clearly set forth in "the notes, the Court have no objection to the exclusion of penal provi-"sions for adultery from the Code; which does not, however, appear to "contemplate any punishment for enticing away females, married or "unmarried, from their legal protectors, and that seems to them a defect. "The Court believe that Regulation VII. of 1819 has been found in "practice to be a very useful enactment, and well suited to the feelings "of the lower classes of the community, who, in cases of wives leaving "their husbands, can by its provisions, get the crime of seduction "punished without their dishonor being brought prominently forward, "the female being induced by fair promises, on the seducer being sent "to jail, to return, and domestic harmony restored."

350. The following remarks we notice as coming from a Bramin, *v.* Streenevasiah, Deputy Sherishtadar under the Collector and Magistrate of Chingleput. Dissenting from the opinion of the Commissioners that it is not advisable to provide a punishment for adultery, he says, "The chief ground of this opinion is the prevalence of polygamy

" in this country, but it is doubtful whether the Commissioners have " taken into their consideration under what circumstances and restric- " tions polygamy is allowed. The Hindoo Law permits it only in cases " where a wife first married was proved barren after a trial of 12 years, " or is afflicted with an irrecoverable disease, or addicted to irremediable " unvirtuous habits, provided these qualities have been established to the " satisfaction of society in which the parties move. It must also be " remembered, that it is not only in cases where a man has more than " one wife that adultery is committed, but women who are the only " wives of their husbands, and to whose comfort and happiness all " possible attention is paid, often corrupt their chastity in consequence " of immoderate lust, or any defect in the graces or qualities of their " husbands, or from want of reciprocal affection, or such other causes not " less forcible than that of having rivals; which cannot therefore justify " the commission of adultery. Offences of this kind are inexcusable " under any circumstances, and whatever may be their inherent causes."

351. As to the alleged reluctance of the Natives to prosecute in cases of adultery, he says, " If the higher classes of Natives shew little or " no desire to bring their corrupt wives to justice, and if the lower class " content themselves with a compensation which would enable them to " re-marry, it is partly owing to the indignation which a public prosecu- " tion causes, and the helpless condition of the poor, and partly to the " implied indifference with which the unchastity of females is understood " to be viewed by European Judges."

352. We have observed that adultery is recognized as an offence by the existing laws of all the Presidencies, and that an Act has been lately passed by the Governor General of India in Council for regulating the punishment of the offence in the Bombay Territories. Adultery is punishable by the Code Penal of France. It is provided for in the Code of Louisiana. The following are Mr. Livingstone's observations on the subject. " Whether adultery should be considered as an offence " against public morality, or left to the operation of the civil laws, has " been the subject of much discussion. As far as I am informed, it " figures in the penal law of all nations, except the English; and some " of their most celebrated Lawyers have considered the omission as a " defect "

II. of 1845.

" Neither the immorality of the act, nor its injurious consequences " on the happiness of females, and very frequently on the peace of " society and the lives of its members, can be denied. The reason, then, " why it should go unpunished, does not seem very clear. It is empha-

" tically one of that nature to which I have just referred, in which the " resentment of the injured party will prompt him to take vengeance into " his own hands, and commit a greater offence, if the laws of his country " refuse to punish the lesser. It is the nature of man, and no legislation " can alter it; to protect himself where the laws refuse their aid; very " frequently where they do not; but where they will not give protection " against injury, it is in vain that they attempt to punish him who supplies " by his own energy their remissness. Where the law refuses to punish " this offence, the injured party will do it for himself; he will break the " public peace, and commit the greatest of all crimes, and he is rarely " or never punished. Assaults, duels, assassinations, poisonings, will be " the consequence. They cannot be prevented; but, perhaps, by giving " the aid of the law to punish the offence, which they are intended to " avenge, they will be less frequent; and it will, by taking away the " pretext for the atrocious acts, in a great measure insure the infliction " of the punishment they deserve. It is for these reasons that the " offence of adultery forms a Chapter of this title."

353. Having given mature consideration to the subject, we have after some hesitation come to the conclusion, that it is not advisable to exclude this offence from the Code. We think the reasons for continuing to treat it as a subject for the cognizance of the Criminal Courts preponderate. We conceive that Colonel Sleeman is probably right in regarding the difficulty of proving the offence according to the requirement of the Mahomedan law of Evidence, which demands an amount of positive proof that is scarcely ever to be had in such a case, as having some effect in deterring the Natives from prosecuting adulterers in our Courts, although the Regulations allow of a conviction upon strong presumption arising from circumstantial evidence. This difficulty, if it has had the effect supposed, will be removed should the Code be adopted. Colonel Sleeman's representation of the actual consequences of the present system, which while it recognizes the offence renders it in the opinion of the Natives almost impossible to bring an offender to justice, it will be observed, coincides with, and confirms practically, Mr. Livingstone's view of the result to be expected when the law refuses to punish this offence. The injured party will do it for himself—great crimes—assassinations—poisonings—will be the consequence. The law here does not refuse, but it fails to punish the offence, says Colonel Sleeman, and poisonings *are* the consequence.

354. Colonel Sleeman thinks that the Commissioners have wrongly assumed that it is the lenity of the existing law that is complained of by the Natives, and believes that they would be satisfied with a less

punishment for the offence than the present law allows, viz. imprisonment for seven years, if it were certain to follow the offender. He proposes that the punishment of a man "convicted of *seducing* the wife "of another" shall be imprisonment which may extend to seven years, or a fine payable to the husband, or both imprisonment and fine. The punishment of a married woman "convicted of *adultery*" he would limit to imprisonment for two years. We are not aware whether or not he intends the difference in the terms used to be significant of a difference in the nature of the proof against the man and the woman respectively.

355. While we think that the offence of adultery ought not to be omitted from the Code, we would limit its cognizance to adultery committed with a married woman, and considering that there is much weight in the last remark in Note Q, regarding the condition of the women of this country, in deference to it we would render the male offender alone liable to punishment. We would however put the parties accused of adultery on trial together, and empower the Court in the event of their conviction to pronounce a decree of divorce against the guilty woman, if the husband sues for it, at the same time that her paramour is sentenced to punishment by imprisonment or fine. By Mr. Livingstone's Code the woman forfeits her "matrimonial gains," but is not liable to other punishment.

356. We would adopt Colonel Sleeman's suggestion as to the punishment of the male offender, limiting it to imprisonment not exceeding five years, instead of seven years allowed at present, and sanctioning the imposition of a fine payable to the husband as an alternative, or in addition.

357. The punishment prescribed by the Code of Louisiana is imprisonment not more than six months, or fine not exceeding 2,000 Dollars, or both. By the French Code, the maximum term of imprisonment is two years with fine in addition, which may amount to 2,000 Francs.

358. If the offence of adultery is admitted into the Penal Code, there should be a provision in the Code of Procedure to restrict the right of prosecuting to the injured husband, agreeably to Section 2, Act II. of 1845.

359. Colonel Sleeman conjoins the offence of seducing the daughter of any person with that of seducing a married woman, and proposes to

render it liable to the same punishment. We conceive that this offence so far as it is proper to treat it as penal, falls within the definition of "kidnapping a child from lawful guardianship" in Clause 354, which applies to any child under 12 years of age. We observe that Colonel Sleeman proposes that in the Clause here referred to, the age should be extended to 14 years, but seeing that 12 years is the age at which by this Code every person is assumed to have attained sufficient maturity of understanding to judge of the nature and consequences of his or her conduct and to give an intelligent consent, such extension does not appear to us to be expedient. Whoever conveys a female above the age of 12 years out of the keeping of her lawful guardian without her "free consent," will be liable to punishment as guilty of "assault or "wrongful restraint," &c., according to the circumstances.

CHAPTER XXV.

OF DEFAMATION.

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360. Defamation is defined in Clause 469 as follows:—"Whoever, "by words either spoken or intended to be read, or by signs, or by "visible representations, attempts to cause any imputation concerning "any person to be believed in any quarter knowing that the belief "thereof would harm the reputation of that person in that quarter, "is said, except in the cases excepted in the nine Clauses next following, "to defame that person."

361. It is explained that no imputation "is said 'to harm a "'person's reputation' unless that imputation directly or indirectly lowers "the moral or intellectual character of that person, or lowers the character, "of that person in respect of his caste or of his calling, or lowers the "commercial credit of that person if he is engaged in trade, or causes it "to be believed that the body of that person is in a loathsome state, or "in a state generally considered as disgraceful."

362. In the Digest submitted by the English Criminal Law Commissioners with their 7th Report, under the head of Libel, are the following definitions.

Art. 1. "A libel consists in some matter or meaning injurious "to individuals or to the public, as in this Act defined, and expressed "or signified by any written, printed, painted or other representations, "characters or signs, or by effigies, dramatic performances or other "visible devices." Chapter XVI. Libel.

Art. 2. "A personal libel is one which expresses or signifies any "contumelious, defamatory or opprobrious matter or meaning designed "to insult or injure any living person, or to disgrace the memory "of one who is dead, and thereby to excite any person to wrath."

Art. 3. "The terms 'defamatory matter or meaning' as used in "the last preceding Article, comprehend any matter or meaning which "tends to injure the reputation, character, or credit of any person, or to "render him odious, contemptible, or ridiculous; or to injure him in his "office, profession, or occupation; or to exclude him from the benefit "and comfort of society."

363. An essential difference between the definition given in the Indian Code and that contained in the Digest of the English criminal law is that the former recognizes "words spoken" as a mode of defamation, and the latter does not.

Note R p 94

364. Upon this point the Authors of the Code say—" We considered " whether it would be advisable to make a distinction between the different " modes in which defamatory imputations may be conveyed: and we came " to the conclusion that it would not be advisable to make any such " distinction."

" By the English Law, defamation is a crime only when it is " committed by writing, printing, engraving, or some similar process. " Spoken words reflecting on private character, however atrocious may " be the imputations which those words convey, however numerous may " be the assembly before which such words are uttered, furnish ground " only for a civil action. Herein the English law is scarcely consistent " with itself. For if defamation be punished on account of its tendency to " cause breach of the peace, spoken defamation ought to be punished even " more severely than written defamation, as having that tendency in a higher " degree. A person who reads in a pamphlet a calumnious reflection on " himself, or on some one for whom he is interested, is less likely to take " a violent revenge than a person who hears the same calumnious reflec- " tion uttered. Public men who have, by long habit, become callous to " slander and abuse in a printed form, often shew acute sensibility to " imputations thrown on them to their faces. Indeed defamatory words " spoken in the presence of the person who is the object of them, necessarily " have more of the character of a personal affront, and are therefore more " likely to cause breach of the peace, than any printed libel."

" The distinction which the English criminal law makes between " written and spoken defamation is generally defended on the ground " that written defamation is likely to be more widely spread and to be " more permanent than spoken defamation. These considerations do " not appear to us to be entitled to much weight. In the first place it " is by no means necessarily the fact that written defamation is more " extensively circulated than spoken defamation. Written defamation " may be contained in a letter intended for a single eye. Spoken defa- " mation may be heard by an assembly of many thousands. It seems to " us most unreasonable that it should be penal to say in a private letter " that a man is dissipated, and not penal to stand up at the Town Hall, " and there, before the whole society of Calcutta, falsely to accuse " him of poisoning his father."

"In the second place it is not necessarily the fact that the harm "caused by defamation is proportioned to the extent to which the "defamation is circulated. Some slanders, and those slanders of a most "malignant kind, can produce harm only while confined to a very small "circle, and would be at once refuted if they were published. A malig-"nant whisper addressed to a single hearer, and meant to go no further, "may indicate greater depravity, may cause more intense misery, and "may deserve more severe punishment than a satire which has run "through twenty editions. A person, for example, who, in private "conversation, should infuse into the mind of a husband suspicions of "the fidelity of a virtuous wife, might be a defamer of a far worse "description than one who should insert the lady's name in a printed "lampoon."

"It must be allowed that, in general, a printed story is likely to "live longer than a story which is only circulated in conversation. But "on the other hand it is far easier for a calumniated person to clear his "character, either by argument, or by legal proceedings, from a charge "fixed in a printed form, than from a shifting rumour which nobody "repeats exactly as he heard it. In general, we believe, a man would "rather see in a newspaper a story discreditable to him which he had "the means of refuting, than know that such a story, though not publish-"ed, was current in society."

365. The English Criminal Law Commissioners very freely admit, that considered abstractly there is no reason for the distinction in question between words spoken and words written. They say, "The "truth of the general abstract proposition is undeniable that when the "subject of publication is in its own nature noxious and offensive, any "mode of publication must be objectionable, and can be material only "as regards the extent and degree of the mischief likely to be occasion-"ed by it." "If a slander conveyed in writing be injurious to reputa-"tion the same must be injurious when published orally, the more espe-"cially if that be done before a great number of hearers." They allow that "slanderous and abusive language may be much more likely to "provoke the party to whom it is applied when spoken in the presence "of many others than if addressed to him by letter, where an interval "was allowed for the subsidence of sudden resentment." Also that a law which "with a view to the public peace, merely prohibited written "insult, would be incommensurate with its object, viz. the preservation "of the peace, which is quite as likely to be broken in consequence of "an oral as of a written insult."

6th Report, p 48 & seq

366. "Each mode of publication," they observe, "may, in truth, "be more pernicious than the other when the comparison is made of "different injurious consequences." They remark however that in ordinary cases there is this marked distinction between oral and written communication, as regards the mind and intention of the publisher and the effect of the thing published, that "the committing of injurious and "defamatory matter to writing evinces a more determined and deliberate "purpose than is ordinarily to be inferred from mere words spoken. "Communications by writing are therefore likely to make stronger "impressions than such as are merely oral. They are permanent and "capable of wider diffusion."

367. Conceding that "distinctions founded merely on a consideration of the particular mode of communication must be in a great measure "arbitrary and artificial, and dependent on reasons of collateral policy "and convenience," they say, "when, however, considerations of extrinsic "policy are taken into the account, and allowed to operate in restraint "of criminal liability, it is obvious that a distinction founded on the "mode of publication, including within its scope such modes as, by their "capability and facility of diffusion and their permanency, must ordinarily be considered as the more dangerous, and excluding such as are "merely oral, may well consist with general convenience."

368. In conclusion they observe, that "Whatever distinction as "concerns the civil remedy, may be made between oral and written "slander, there are several reasons for confining penalties in respect of "personal defamation to written publications. In the first place, to "extend the offence to oral defamation would be inconvenient." "In "the next place, the proof of an offence committed by the writing and "publishing of illegal matter is far more definite and complete than "where the offence is merely oral, when so much depends on tone and "manner, the situation of the speaker, the circumstances under which "he spoke, the understanding and memory of the hearers". The inconvenience referred to is that "to make mere oral communications penal "when they reflected on the characters of individuals, would be a heavy "restraint on the ordinary intercourse of mankind, and would necessarily and unavoidably occasion much and vexatious litigation, and "would weaken the great securities for the discharge of legal as well as "moral obligations, the love of reputation, and the fear of public censure "and disgrace."

Law Magazine, August 1843

369 By the Bill brought into the House of Lords by Lord Campbell in 1843, founded on the Report of a Select Committee of that

House it was intended to put oral slander on the same footing as written slander. But this alteration was not agreed to by Parliament, and the Act passed to amend the law respecting defamatory words and libel (6 and 7 Victoria, Chap. 96) was clipped of the Sections which provided for it. The grounds of the proposed alteration are thus stated in the Report. "At present, while for many words reduced into writing which in any way "tend to injure reputation, though communicated to only one individual, "the law gives a remedy, there is no remedy, without proof of special "damage, for mere words, however injurious to reputation, and however "publicly spoken, unless they impute an indictable offence, or apply to "a man in his business, or import that he is labouring under an infectious "disease, so that falsely and maliciously to impute, in the coarsest terms "and on the most public occasion, want of chastity to a woman of high "station and unspotted character, or want of veracity or courage to a "gentleman of undoubted honesty and honour, cannot be made the "foundation of any proceeding, civil or criminal; whereas an action may "be maintained for saying that a cobbler is not skilful in mending shoes, "or that any one has held up his hand in a threatening posture to "another. The Committee conceive that these distinctions, which are "quite peculiar to the law of England, do not rest on any solid "foundation, and that wherever an injury is done to character by "defamation there ought to be redress by action."

370. We have quoted the foregoing passage because we think the reasons contained in it are equally valid against maintaining a distinction between words spoken and words written in regard to criminal proceedings. We concur in the remark made by the English Criminal Law Commissioners that "it is difficult to suggest any good reason for "making penal restraints for the protection of property or for the safety "of the person, which would not be equally applicable to the provid-"ing for the protection of reputation." And it seems to us that their reasoning on this point applies indifferently and with equal force to every mode in which imputations injurious to reputation can be conveyed, to defamatory words spoken as well as written. 6th Report, p 48

371. We have to mention that Sir R. Comyn though inclined to agree in many of the arguments adduced in the Note (R) to this Chapter, is not able to arrive at the same conclusion on all the points, particularly as to verbal slander, which he thinks should not be put on the same footing as that which is written or printed. Sir H. Seton has the same opinion on this point, considering that the law of England in denying criminal redress to verbal slander affords a specimen of practical wisdom

372. The definition of defamation in the Indian Code it will be observed is subject to nine exceptions, which are specifically set forth in the Clauses from 470 to 478.

373. The first exception introduces a new principle, by declaring that " it is not defamation to attempt to cause any thing which is true " to be believed in any quarter concerning any person."

374. In the Digest submitted by the English Criminal Law Commissioners in their 6th Report they provided for the punishment of any person publishing a personal libel *which should be false*, if the falsity of it were alleged in the indictment, by a heavier penalty than that prescribed for the publication of a personal libel *not* alleged to be false, allowing the truth of the libel to be proved by the defendant in bar of the prosecution in the former case, but not in the latter.

p 70 375. " We recommend," they said, " that in respect of personal " libels, two distinct classes of offence should be constituted. That one " of these should be founded on the general principle of protection to " private reputation against such defamatory imputations as are false as " well as malicious. That the second should be founded on the principle " already established, of protection to the public peace by preventing the " publication of libels on private persons tending to the disturbance of " the peace."

" That in respect of the former class, the truth of the matter " published, when it either directly or by implication contained a charge " of misconduct, should be a bar to the prosecution. That in cases " within the latter class, the truth of the matter published should in no " case be available by way of defence to the publisher of the libel."

" But that in either case, and generally evidence of the truth or " falsity of the matter published should be admissible where the occasion " of the publication was a privileged one, such as legally to raise the " question as to the actual intention of the defendant, whether he acted " *bonâ fide* in reference to the particular occasion, or with an actually " malicious intention independently of the occasion."

Art 16, p 239 376. A provision to the latter effect is inserted in the Digest contained in the 7th Report, but the provision for the aggravation of punishment in the case of a libel proved to be false is omitted, and the exculpation of the defendant by proof of the truth of the matter published is not permitted. The Commissioners still thought that the laws

should be extended so as to admit proof of the truth, but they inclined to the opinion that it would be preferable to visit the offence of publishing a personal libel with a specific penalty, with a proviso that the defendant should by proving the truth be enabled to reduce it to a lower limit, on the principle that a libel must be taken to be false until the truth be proved, and that it therefore lies on the publisher to allege and prove the truth where he insists that the charge is true. Until it should be determined whether the law should be extended, and if extended whether according to their former or their latter suggestion, they adapted the Articles in the Digest to the present state of the law. 7th Report, p 112

377. The Statute 6 and 7 Victoria, Chapter 96, provides distinctly for the offence of *maliciously publishing a defamatory libel knowing it to be false*, and for the offence of maliciously *publishing a defamatory libel.* Section 4. 5

378. It does not, as proposed in the 6th Report, allow the truth of the imputation to be inquired into *only* when the indictment alleges the imputation to be false, but to entitle the defendant in a trial for a defamatory libel to give evidence of the truth of the matter charged it is made necessary for him to allege the truth thereof in the manner now required in pleading a justification to an action for defamation, and further that the publication was for the public benefit, and it is enacted that the truth of the matters shall not be inquired into without such plea or justification.

379. The Authors of the Indian Code have stated fully in Note R the reasons upon which they came to the conclusion that the truth of an imputation prejudicial to character ought in all cases to exempt the Author of that imputation from punishment as a defamer. They consider these two propositions to be established by their argument; " first, that in some " cases of prosecution for defamation the truth of the imputations alleged " to be defamatory ought to be a justification; secondly, that in the vast " majority of such cases, if not in all, truth, if it be not a justification, " ought to be a mitigation." From these two propositions they deduce a third " that in all cases of prosecution for defamation, if the defendant " avers that the imputations complained of as defamatory are true, the " Court ought to go into the question of the truth of those imputations." p 98.

" This ought to be done, not only in justice to the public, and to " the defendant, but in justice to the innocent complainant. It must " not be forgotten that one of the most important ends which a person " proposes to himself in prosecuting a slanderer is the refuting of the

" slander. He generally considers the punishment of the offender as a " secondary object; and, when there is no circumstance of peculiar " aggravation in the case, is often willing to stay proceedings after " obtaining a retractation and apology. To clear his fame is his first " object. It is, we conceive, an object for the attaining of which he is " entitled to the assistance of the law. But it is an object which cannot " be attained unless the Courts go into the question of truth."

380. " But," they proceed, " if in all cases the Courts allow the " question of truth to be gone into, we are satisfied that no respectable " person will venture to institute a prosecution for defamation in a case " in which he knows that the truth of the defamatory matter is likely to " be proved. He will feel that by prosecuting he should injure his " own character far more deeply than any libeller can do. However " disagreeable it may be to his feelings that a discreditable story " concerning him should be repeated in society and should furnish " paragraphs for the newspapers, it must be much more disagreeable that " such a story should be proved, in open Court, by legal evidence. By " prosecuting he turns what was not at most a strong suspicion into an " absolute certainty. While he forbears to prosecute, many people will " probably disbelieve the scandalous report, many will doubt about its " truth. The mere circumstance that he abstains from prosecuting is no " proof of guilt. It is notorious that slanders are often passed by with " silent contempt by those who are the objects of them. Indeed, in a " country where the press is free, a man whose station exposes him to " remark would have nothing to do but to prosecute, if he should " institute legal proceedings every time that he might be calumniated."

p 99. 381. They say " it has been suggested to us from quarters " entitled to great respect, that it would be a preferable course to admit " in every case the truth of matter alleged to be defamatory to be given " in evidence, for the purpose of proving that the accused person had " not acted maliciously; but not to allow the proof of the truth to be a " justification if it should appear that reputation had been maliciously " assailed."

382. This suggestion very nearly corresponds to the provision in Article 387 of Mr. Livingstone's Code, viz. " Allegations in writing " made with respect to all other than official acts (elsewhere provided for) " which would if they were false, be defamation, shall, although true, " constitute that offence, if they are made from motives of revenge, " hatred, or ill-will of any other kind, entertained by the party making " them, or to gratify either of those passions in any other, and they

" shall be deemed to have been made from such motive in all cases in " which the defendant cannot show that he was actuated by some motive " of public good or private duty in making the allegation." It will be observed that the resemblance is close between this provision and that contained in Section 6 of the new Libel Act mentioned above.

383. The Authors of the Code remark upon the suggestion above-mentioned that " if a provision of this kind were adopted, it would for " the reasons which we have already given, be in practice " nugatory. For no respectable person would prosecute the Author " of an imputation which could be proved to be true. And we take " it for granted that the law of procedure will not be framed in so " cruel and unreasonable a manner as to permit a prosecution for " defamation to be instituted in opposition to the wishes of the person " defamed." p. 100.

384. " But," they continue, " if the provision which we are " considering were not certain to be in practice nugatory, we should " think it a highly objectionable provision. When an act is of such " a description that it would be better that it should not be done, it is " quite proper to look at the motives and intentions of the doer for the " purpose of deciding whether he shall be punished or not. But when " an act which is really useful to society,—an act of a sort which it " is desirable to encourage, has been done, it is absurd to inquire into " the motives of the doer for the purpose of punishing him if it shall " appear that his motives were bad."

385. Pursuing their argument they maintain that " no act ought " to be made punishable on account of *malicious intention*, unless it be " in itself an act of a kind which it is desirable to prevent," and consequently that " malice is not a test which can with propriety be used for " the purpose of determining what true imputations on character ought " to be punished, and what true imputations on character ought not to " be punished."

386. It seems to us that all this may be admitted, and that the principle of the provision contained in Section 6 of the new Libel Act may be maintained notwithstanding, namely, the principle that the truth of the imputation complained of shall amount to a defence if it was for the public benefit that the imputation should be published, but not otherwise. The Select Committee upon whose Report the Bill for amending the law of libel was founded expressed their sentiments on this point as follows :

"The Committee are of opinion that the truth ought not to amount "to an absolute defence in a criminal or civil proceeding for libel, but "that it ought to be received as an ingredient in the defence, to enable "the Jury to determine whether upon the whole the publication is "justifiable. A difficulty arises as to the question to be submitted to "the Jury beyond the truth of the imputation. Some witnesses suggest-"ed that it should be the motive of the defendant; but the just consi-"deration seems to be, whether the public have an interest in the truth "being made known to them. It is only in such a case that private "offences ought to be made the subject of public comment, and in such "a case, for the good of the community, the publication must be "tolerated, though prompted by spite. The Committee think that "admitting evidence of the truth under this limitation will remove a "scandal from the administration of justice, and will have a strong "tendency to put down the infamous libellers, who, living by deliberate "calumny, when prosecuted complain of the existing law of libel by "which all inquiry into truth is forbidden, assert that if permitted they "could justify all their fabrications, and thus sometimes succeed in "creating public sympathy in their favor against those whom they have "so cruelly outraged."

387. Recurring to the argument of the Authors of the Code it seems to us that the publication of the private history of individual members of society is scarcely "an act of a sort which it is desirable to "encourage" absolutely. We are inclined to agree with the Select Committee that there are many cases in which a wrong, for which a remedy should be given, may be done to an individual by making public what may be proved to be true concerning that individual,—"as where "the imputation refers to some personal defect, or an error of conduct "long atoned for and forgotten;—and that the justification equally in "criminal and civil proceedings, ought not to be complete without "showing to the satisfaction of the Jury," (or the Judge, as it may be,) "that the community had an interest in the truth being known," or in other words, that the publication was calculated to prevent some detriment to the community, or to serve some purpose by which the community would be benefited.

388. The Authors of the Code admit that the throwing of true
p. 100 imputations on character "may be a very pernicious act." They say, "We are sure that it is often a great public service; and we are sure that "it may be very pernicious when it is not done from malice, and that it "may be a great public service when it is done from malice. It is per-"fectly conceivable that a person might, from no malicious feeling, but

" from an honest though austere and injudicious zeal for what he might " consider as the interests of religion and morality, drag before the public " frailties which it would be far better to leave in obscurity." From which it appears to us to follow, that the law should not indeed inquire into the motive of the defendant, but should inquire into the question whether what he has done be for the public good or not.

389. Again it is said, " It is also perfectly conceivable that a " person who has been concerned in some odious league of villainy and " has quarrelled with his accomplices, may from vindictive feelings " publish the history of their proceedings, and may by doing so render " a great service to society." True—but here the publication would be justifiable under Section 6 of the Libel Act by the public benefit it was calculated to produce.

390. On the whole we are led to conclude, that the first exception ought to be qualified so as to make the admission of the truth as a defence to a prosecution for defamation depend upon conditions such as are prescribed by the English Statute.

391. We think that the opinion above quoted, that no respectable person would prosecute the author of an imputation which can be proved to be true, is not to be admitted without qualification. We can conceive a person who has rendered himself respectable by a long course of good conduct in a certain sphere, whose reputation has been maliciously attacked by some one raking up and publishing a transgression of an earlier period, long since " atoned for and forgotten," prosecuting the author of the attack under a law which like the new Statute obliges the party who makes a defamatory imputation to prove not only the truth of the imputation, but also that it was for the public benefit to publish it. We can imagine such a person ready to prosecute, and willing if need be to admit the truth, that he may have at the same time the opportunity to prove by the testimony of those among whom he has lived for years, and who have known him intimately, how amply he has atoned for the transgression; grieved and hurt at the revival of a passage of his life's history of which he felt ashamed, but conscious that he had made amends by his subsequent career, he would, we imagine, be impatient to counteract the poison by setting off the long course of virtuous conduct against perhaps the single error, or it may be the deviation of a season. He would not let the bane work when he could, with a little moral courage, supply an antidote. And we conceive he would have the sympathy of the better part of the public with him.

392. In the opinion we have expressed against the unqualified adoption of the first exception, we concur with Mr. J. F. Thomas, whose observations upon the subject are highly deserving of attention; and with Mr. Greenhill, who has offered some pertinent remarks to shew the inexpediency of admitting the truth as a defence without reserve.

Note R p 94

393. For reasons which are sufficiently explained in the Note, the Code makes defamation an offence "without any reference to its tendency "to cause acts of illegal violence"

394. Upon this Mr. Norton says, "Defamation in most people's "estimate will, I believe, be considered purely as a civil wrong, when "directed against individuals—except in so much as its tendency may "be to create open commotion or violence, from the irritation thereby "created. Those who do not concede any such tendency, or, conceding "it, doubt (as the Commissioners do) the propriety of such tendency "being considered a criterion of criminality, would find it difficult to "assign a sound reason for distinguishing an injury done by personal "defamation from any other civil injury."

395. We may cite by way of answer to Mr. Norton, the following observations of the English Criminal Law Commissioners. "It has "appeared to us, after attentive consideration, that the law of England, "in making the criminal branch of the offence to depend on the tendency "of the libel to provoke to a breach of the peace, is constructed on too "narrow a basis. And we apprehend that some incongruities which are "to be found in the practical application of this branch of the law are "attributable to this defect."

6th Report, p 54.

"Although it be true that the danger to the public peace is one "ground for penal restraint, it is not, we think, an exclusive one. The "injury to private reputation is beyond all doubt a sufficient ground of "legal interposition for the protection of reputation, by giving a remedy "in damages, and there seems to be no satisfactory reason why that "protection should be so limited to civil reparation any more than there "is in the case of mere spoliation of property. The law which gives a "remedy in damages in respect of trespass to property, is confessedly "insufficient for the protection of proprietors against the fraudulent "abstraction of property; and in many instances severe penal restraints "against malicious destruction or damage are deemed to be necessary "to the extent even of subjecting offenders to the penalty of transporta-"tion. Although it be not necessary to punish a malicious libeller in "respect of the destruction of private reputation with so much severity,

" the law might justly be regarded as inconsistent and defective which " thus carefully protected property, but afforded no more than the " mere civil remedy in respect of wilful injuries to reputation. In " the former case the injury is made penal, simply because the giving " a remedy by action affords no adequate protection against injuries of a " fraudulent or malicious nature perpetrated, it may be, by offenders " unknown, or where known, irresponsible through poverty or other " circumstances But precisely the same reason, viz. the inadequacy of " the civil remedy, suggests the expediency of also affording protection " by the like means against malicious attacks so easily and frequently " made by otherwise irresponsible authors."

396. We need hardly say after citing the above remarks, which appear to us to be perfectly just, that we do not see the force of Mr. Norton's observation, that " when the Commissioners avow that the " truth of defamatory charges is a legal excuse for the permanent disse- " mination of them, and at the same time disallow the tendency to " irritation and consequent breach of the peace as any criterion of crimi- " nality, they appear to overthrow all foundation of *criminality* whatever " in defamation." We shall only observe that it would be more proper to describe the Code as disallowing the tendency to irritation, not as any criterion, but as *the sole* criterion of criminality in defamation. It makes defamation an offence independently of any such tendency; " because " defamatory imputations of the worst kind may have no tendency to " cause acts of violence;" but the tendency of calumnious imputations to provoke breaches of the peace is undoubtedly one of the reasons for making defamation an offence.

397. The Indian Code, it is to be observed, agrees on this point with that framed by Mr. Livingstone, in which it is declared that the offence of defamation " consists in the injury offered to reputation, not in any " probable breach of the peace or other consequence that may result " from it."

398. Mr. Norton considers that the Chapter " errs throughout as " well in principles as in details " As to principles, we have seen that he thinks it errs in making defamation an offence without reference to its tendency to provoke breaches of the peace. He thinks it wrong also in the exception which admits the truth to be pleaded. As to details, he says, " I think all impartial persons versed in the English law of libel, " or unversed in any law, will be ready to exclaim against the involved " and perplexing definition of defamation, with its accompanying expla- " nations and exceptions as detailed in this Chapter. Such phrases as

" '*attempting* to cause it to be *believed*,' instead of the term '*publishing*' " and designating the matter published as 'an imputation which would " 'harm reputation' in 'the quarter' where 'believed,' but which is not " to be defamation if published '*in good faith* respecting the conduct of " 'a public servant in the discharge of his functions,' or if published of " 'any person respecting his conduct touching any public question,' or " being censure of the 'conduct of a person in *matters* to which the " 'publisher's *lawful* authority over another *relates*'—and so on, appear " to me to give the widest latitude of construction."

399. The phrase "attempting to cause it to be believed" taken by itself might be obscure, but it is not to be taken by itself, and when it is considered together with the words which are intended to determine the meaning, it appears to us to be perfectly intelligible, and to make the definition sufficiently precise. We venture to say this in the face of Mr. Norton's assertion that "the various *modes* which may be adopted of " publication or 'attempting to cause it to be believed' by no means help " out the vague generality of the phrase adopted." The term publishing, which he seems to prefer, it is obvious, would not suit the definition, without other words to qualify and apply it, for it is not the mere general promulgation of an imputation that is aimed at, but the notification of it in such a way that it may reach a particular quarter and cause an unfavorable impression in that quarter, it being explained that " an imputation which is defamatory when intended to be believed in one " quarter is not necessarily defamatory when intended to be believed in " another quarter."

400. Respecting the modes of defamation specified in the definition, Mr. Norton observes " they are all obvious methods of publication " but in all qualified by reference to the ulterior intention of the parties " in so issuing the libel." Again he says " the gloss put by one of the " illustrations upon the meaning of 'attempting to cause it to be believed' " under which all publishers of libels are to be held guiltless unless their " *intention* appears of causing the imputation to be believed" " gives a " general franchise of libelling." He appears to allude here to the illustration (*h*) under Clause 469, which admits of a *defence* against a charge of defamation on the part of a person who has been unintentionally an agent in the publication or circulation of defamation. A charge of defamation must impute to the party accused the intention described in the definition of the offence, as inferrible from the circumstances to be given in proof. It will be for the party accused to allege and prove any special circumstances by which that inference may be avoided, or to

shew that the alleged intention is not justly inferrible from the circumstances proved by the prosecutor. The English Criminal Law Commissioners say "ignorance of the contents of the matter published by a "party, or to the publication of which he was instrumental, must in "principle be regarded as a sufficient legal excuse, provided the want "of knowledge be not in itself wilful with a view to impunity, or other-"wise culpable. In such cases the total absence of all criminal design "or neglect ought to exempt from penal consequences."

6th Report, p. 51.

401. With reference to the illustration (*h*) we have to remark, that it seems to apply to the explanation which intimates that "it is not "necessarily defamation to repeat or circulate an imputation which it "was defamation originally to make." The journeyman printer may be acquitted of defamation on the ground that in setting the types for printing defamatory matter and so aiding towards the circulation thereof, he had not the intention described in the definition, and had therefore not aided voluntarily, according to the definition of that term in Clause 26, to harm the reputation, &c., while the person who wrote the defamatory matter, for printing which the journeyman ignorantly set the types, may be convicted, because it may be clear that his purpose was to defame. Though the journeyman printer may be acquitted of defamation because of his unconsciousness of the tendency of the matter printed, the possessor of the press is not allowed this plea when the press has been used for printing a defamatory imputation, unless he can prove that the printing was purposely concealed from him—in this case, and also if the printing was contrary to his directions, he is exempted from punishment, otherwise he is liable to the same punishment as for defamation.

Clause 480.

See Libel Act, 6 and 7 Vic., C. 96, S. 7.

402. It seems to us that the exceptions which Mr. Norton represents as "giving the widest latitude of construction" are really not liable to this reproach. We cannot see the vagueness which he attributes to them. Having well considered the terms in which the exceptions are expressed, they appear to us, indeed, to be remarkably free from ambiguity. We cannot discover whether Mr. Norton considers these exceptions, that is to say, the exceptions contained in the Clauses from 471 to 478 to be objectionable in substance as well as in the form of expression, further than that he says of one of them, the fourth, (Clause 483) that "the liberty given of expressing in *good faith* "*any opinion* whatever respecting the conduct or character of any "party, witness, or *agent* in any case brought before a Court, or "their *character* as far as it appears in such conduct, excites my "astonishment."

403. Upon this exception the authors of the Code remark as follows :

p. 102. "By Clause 473 we have allowed all persons freely to discuss in "good faith the proceedings of Courts of law, and the characters of "parties, agents, and witnesses, as connected with those proceedings. "It is almost universally acknowledged that the Courts of law ought to "be thrown open to the public. But the advantage of throwing them "open to the public will be small indeed, if the few who are able to press "their way into a Court are forbidden to report what has passed there "to the vast numbers who were absent, or if those who are allowed to "know what has passed are not allowed to comment on what has passed. "The only reason that the whole community is not admitted to hear "every trial that takes place is that it is physically impossible that they "should find room, and by Clause 473 we do our best to counteract the "effect of this physical impossibility."

404. We cannot account for Mr. Norton's "astonishment" at the exception which allows free comment in good faith on the conduct of any person as a party, witness, or agent, in any case before a Court of Justice, or on his character as it appears in such conduct. We can hardly believe that he would disallow such a comment as that instanced in the illustration (*a*); nor with respect to an *agent* in a case in which the evidence brought forward by him was proved to be entirely false, that he would refuse protection to the reporter if he remarked that the conduct of the agent in trumping up such a case was scandalous.

Clause 473.

405. The exceptions from the 5th to the 9th appear to be embraced in Articles 11 and 14 of Chapter XVI. of the Digest of the English Criminal Law Commissioners, in which are described the publications that are held to be "justifiable either absolutely or in a qualified "manner in respect of the occasion." Article 14 would seem also to cover the 2d and 3d exceptions, as it justifies publications "made bonâ fide" "for the benefit of any party or of the public," or "with a view "to the discussion of any acts, measures, or proceedings affecting the "public," "or otherwise howsoever, any party or the public having an "interest in the making or receiving of such communication." This Article it may be observed admits of much wider "latitude of construction" than the exceptions in the Code.

Clauses 474 to 478.
7th Report, p. 238-9.
471-2.

406. We have seen that the first exception in the Code makes the truth a defence. In the eight following exceptions it is not required that an imputation should be true. "We require only," say the authors

p. 102.

of the Code " that it should be made in good faith. For to require in " these cases that the imputation should be true would be to render " these exceptions mere nullities." So by the above Articles of the Digest " a publication is justifiable in a qualified manner in respect of " the occasion whensoever it is made *bonâ fide* concerning any other " person" for any of the purposes therein described.

407. The authors of the Code observe that " whether an imputa- p. 103.
" tion be made or be not made in good faith is a question for the Courts " of law. The burden of the proof will be sometimes on the person " who has made the imputation, and sometimes on the person on whom " the imputation has been thrown. No general rule can be laid down. " Yet scarcely any case could arise respecting which a sensible and " impartial Judge would feel any doubt. If, for example, a public " functionary were to prosecute for defamation a writer who had " described him in general terms as incapable, the Court would probably " require the prosecutor to give some proof of bad faith. If the prosecutor " had no such proof to offer, the defendant would be acquitted. If the " prosecutor were to prove that the defendant had applied to him for " money, had promised to write in his praise if the money were " advanced, and had threatened to abuse him if the money were with- " held, the Court would probably be of opinion that the defendant had " not written in good faith, and would convict him."

" On the other hand, if the imputation were an imputation of some " particular fact, or an imputation which, though general in form, yet " implied the truth of some particular fact, which, if true, might be " proved, the Court would probably hold that the burden of proving " good faith lay on the defendant. Thus if a person were to publish " that a Collector was in the habit of receiving bribes from the Zemin- " dars of his district, and were unable to specify a single case, or to give " any authority for his assertion, the Courts would probably be of " opinion that the imputation had not been made in good faith."

408. " It will be necessary" they further observe, " to provide in " the Code of Procedure rules for pleading in cases of defamation, which " may give to an innocent man who has been calumniated the means of " clearing his character. It will be proper to provide that a defendant " who is accused of defamation, and who rests his defence on the truth " of the imputation alleged to be defamatory, shall be held strictly to the " proof of the substance of the imputation if the imputation be particular, " and shall be compelled to descend to particulars in his plea, if the " imputation be general."

409 Upon the explanation annexed to the definition of defamation, that "a collection of persons cannot, as such, be defamed," Mr. Norton remarks that he does not know on what principle libels against public bodies, &c., are exempted from criminality. Such libels are not however exempted from criminality, as the same explanation intimates that a defamatory imputation thrown on a collection of persons is an offence against each one of those persons—Thus "it may be defamation of every Judge of the "Sudder, to say—'The whole Sudder Court is corrupt.'" We may note that the Chapter of the Digest under the title of Libel, like the Chapter of Defamation in the Code, is confined to defamatory imputations upon individuals.

Illustration (1) Clause 469

410. As Clause 480, as above observed, makes the possessor of the press by which defamatory matter is printed liable to punishment without proof of his having had the intention described in Clause 469, so also, by Clause 481, the person who first sells or offers for sale any printed or engraved substance containing defamatory matter is made liable to punishment without proof of such intention.

411. Sir H. Seton suggests that a question may arise as to who is the first seller, &c., when a work is first advertised for sale at different places at the same time.

412. Generally, we apprehend, when a work is so advertised for sale at different places, there is one principal or original seller at the place of publication, who supplies copies of the work to the appointed sellers at the other places by wholesale. In such cases we conceive that this wholesale dealer from whom the others purchased will be the first seller within the definition. Some works however are published as a joint stock concern by several parties residing at different places, and they probably receive their shares direct from the printer, and dispose of them partly by wholesale to other dealers, and partly immediately by retail at their own shops. Each of these parties we think is to be considered as a first seller, that is to say, as selling at first hand within the meaning of the definition. If this view is held to be correct, it may be advisable to subjoin to Clause 481 corresponding illustrations.

413. We have to remark that by the Code the maximum punishment for defamation, which implies a false imputation, is simple imprisonment which may extend to two years, or fine, *or both*. By the Libel Act the maximum punishment for a *false* libel is the same except that fine is prescribed positively in addition to imprisonment. The punishment

for a person convicted of a defamatory libel without reference to its truth or falsity is imprisonment not exceeding one year, *or* fine, *or both.*

414. We have only further to observe upon this Chapter, that Mr. Hudleston, one of the Judges of the Madras Sudder Court, is "decidedly "of opinion that its omission is more advisable than its retention in a "Criminal Code for this country." While Mr. Giberne, one of the Judges of the Bombay Sudder Court, remarks that "the provisions and "principles upon which the law of defamation has been framed appear "most excellent, and all that can be said has been said in that very "interesting Note R." Mr. Hudleston says more particularly, "The "explanations are highly artificial—out of place in a Criminal Code—"the definition an over-refinement—the whole calculated to do harm "rather than good; to lead to groundless prosecutions, and to involve "the tribunals in investigations, tending to no practical advantage." With respect to the first explanation in Clause 470, he says "I would "not carry the principle of legislation on this subject further than it is "in England." Again he says, "The libel punishable should be such "only as is malicious and intended to provoke to rage, or expose the "libelled to public hatred, contempt, and ridicule."

CHAPTER XXVI.

OF CRIMINAL INTIMIDATION, INSULT, AND ANNOYANCE.

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415. This Chapter is in some sort supplementary to the Chapter
p 104 "of Defamation." It is observed in Note R on that Chapter, that an imputation which is not defamatory under the definition, explanations, and exceptions in that Chapter, may, under certain circumstances, be punishable on other grounds. For example, "an imputation which is "not defamatory may be uttered in the hearing of the person who is the "object of it for the purpose of wantonly and maliciously annoying that "person. If so, it is punishable under Clause 485 (487). There are "many cases in which it is fit that unpleasant truth should be told "respecting an individual. But there is no case in which it is desirable "that such truth should be told in such a way that the telling of it is "a gross personal outrage. A person who has detected, or thinks that "he has detected, a dishonest misrepresentation in a book, has a right "to expose it publicly. But he cannot be allowed to intrude into the "presence of the author of the book, and to tell him to his face that he "is a liar. A person who knows the mistress of a female school to be a "woman of infamous character, deserves well of society if he states what "he knows. But he cannot be allowed to follow her through the streets "calling her by opprobrious names, though he may be able to prove that "all those names were merited. A person who brings to notice the "malversation of a public functionary deserves applause. But a person "who hangs a public functionary in effigy at that functionary's door "with an opprobrious label, does what cannot be permitted even though "every word on the label, and every imputation which the exhibition "was meant to convey, may be perfectly true."

416. Mr. Hudleston, Judge of the Madras Sudder Court, who so decidedly objects to the Chapter of Defamation, questions the expediency of this Chapter also, considering that "the enactment of its provisions, "among other mischievous consequences, would bring the administration "of criminal justice to a stand, and that the Magistrate would in vain "attempt to dispose of the work which these provisions alone would "probably create." Mr. Giberne, Judge of the Sudder Court at Bombay, on the other hand, expresses approbation of this Chapter, as he does of the Chapter of Defamation

417. Mr Norton says, "There seems to me much propriety in "making provisions against crimes classing under 'intimidation'—but "as regards the mode in which that object is accomplished in this "Chapter, it appears to me sufficient to point out that, without strain-"ing constructions beyond the legitimate meaning of the language, any "person who shall *threaten* to kill his neighbour's cat which trespasses, "intending to 'distress' the owner of it by such *threat* (no act being "done) may (under Clause 482) be punished by two years imprison-"ment." We are obliged to remark on this criticism that it does appear to us to savour of a "strained construction." Distress is a term of strong signification, rendered by Dr. Johnson by the words "calamity, "misery, misfortune," it is used as synonymous with affliction, and in this place its connection with the word "terror" denotes clearly that it is not a trifling pain which will pass as fulfilling the definition. It may be, however that a person has that degree of attachment to or value for a cat that a threat to kill it would cause real distress to that person; and if any person from a malignant desire to distress his neighbour deliberately threatens to kill his cat which he knows him to value so highly, it does not appear to us to be ridiculous that he should be liable to punishment under this Clause. It is we conceive a "strain" to suppose that the punishment might be imprisonment for two years, that is to say, the maximum punishment authorized by the Clause for the gravest form of criminal intimidation, namely, a threat of murder.

418. We have said that it appears to us that the object of Clause 283 may be met by extending Clause 482 which defines "criminal "intimidation" so as tacitly to include the species of intimidation against which the said Clause is directed. We propose to insert before the words "with the intention of causing," the words "or holds out to any "person a threat of any injury or misfortune to be brought upon "that person directly or indirectly."

419. There are special Statutes in the English Law for offences of this nature. The offences to which those Statutes apply, according to Russell, are, "I. The sending or delivering any letter or writing "threatening to kill or murder, or to burn or destroy houses, &c. "II. Demanding property with menaces, with intent to steal. III. "Accusing or threatening to accuse of an infamous crime, with an "intent to extort or gain, and thereby extorting or gaining. IV. "Sending or delivering any letter or writing demanding with menaces, "and without any reasonable cause, any Chattels, &c. V. Accusing "or threatening to accuse any person of any of the crimes mentioned in "the Act, with an intent to extort, &c. VI. Sending or delivering

Russell 2, p 579.

"any letter or writing, accusing or threatening to accuse any person of "any such crimes with a like intent" In the Digest of the English Criminal Law Commissioners the provisions relating to offences of this description seem to be distributed under the heads of "Offences against "the public peace" and "Extortion by threats." The punishments are transportation for life, or for a term not less than seven years, or imprisonment for a term not exceeding three years. Except in the case of sending a letter threatening to kill or murder or to burn or destroy houses, &c. it must be alleged that the offence was committed with a view to extortion, in order to bring the offender within the reach of the law. By the Code the offender will be liable if his object was to cause distress or terror to the person to whom the threat was conveyed, or to induce that person to do what he was not legally bound to do, or to omit what he had a legal right to do. The Code is therefore more comprehensive in regard to the intention, as it is also in regard to the nature of the threats.

420. The punishment prescribed by the Code is much more lenient than that ordained by the English Law. For the offence of criminal intimidation in ordinary the maximum punishment is imprisonment which may extend to two years, with or without fine; when the offender has taken precaution to conceal the quarter from whence the threat comes the imprisonment may extend to three years.

421. A good deal of objection has been made to Clause 485 and the Clauses following, relating to insult and annoyance by a person "uttering any word, making any sound, making any gesture, or exhibit-"ing any object intending that such word or sound shall be heard, or "that such gesture or object shall be seen by any person": intending thereby to insult* or annoy† that person, or intending specially to insult the modesty of a woman‡ by word, sound, gesture, or exhibition.

* 485
† 487
‡ 486

422. Mr. Norton makes the following observations—"It appears "to me that all the Clauses against 'insult' and 'annoyance' by *words*, "*gestures* or *sounds*, must (where they deserve criminal punishment at all) "more appropriately rank under 'defamation' or contempts of Judicial "authorities. And it appears to me that nothing can more forcibly "corroborate the observations I have made regarding the exemption "of true defamation from criminal cognizance than the necessity of these "extraordinary enactments (as they seem to me) against *insulting* "words, *gestures* and *sounds*—which, if they are not two trivial for any "legal cognizance whatever, can only be criminal as creating irritation, "and tending consequently to occasion acts of open violence."

423. Mr. Hudleston says, " I consider this Clause quite preposte-
" rous, and I entirely concur in opinion with those gentlemen, who
" recommend the omission of it and of the two Clauses which follow.
" The second paragraph of the explanation to Clause 485 is not very
" clear—the illustration (*b*) seems to suppose the absence of the power
" of punishing for contempt of Court."

424. Sir R. Comyn points out the extreme vagueness of the words
" insult" and " annoy." He observes that " the offence is made to
" depend almost entirely upon the sensitive feelings of the person
" complaining of the annoyance, and not upon distinct definition. A
" private offence is converted into a matter for public prosecution."

425. It seems to us that the observation of the learned Judge as to the offence depending upon the sensitive feelings of the person complaining is not well founded. It depends surely upon the calm dispassionate opinion of the Judge whether the act complained of was from its nature and the circumstances attending it calculated to insult, and was done with the intention of insulting the complainant. We have elsewhere noticed the objection to the words " insult" and " annoy" on account of their alleged vagueness. We do not think that as they are here used there is any probability of their being misunderstood.

426. We are not sure that Mr. Norton is positively of opinion that the offences against which these Clauses are directed are too trivial for legal cognizance. It will be observed that his expressions are doubtful. We are ready to concede to him that the tendency of such insults and annoyances as are contemplated in these Clauses, to create irritation and to provoke acts of violence, is an influential reason for treating them as criminal, but we do not think that this is the *only* reason for so treating them. For example, we think it a perfectly legitimate object of penal legislation to provide, as in Clause 486, for the protection of a woman against insult to her modesty, in consideration especially of her inability to protect herself, and of course without respect to any risk of a breach of the peace from her attempting to avenge herself.

427. We conceive that the object of the law is properly twofold, on the one hand to defend the weak by holding out punishment to those who shall disturb their peace by insult and annoyance, and on the other hand, to restrain those who have strength to avenge themselves from resorting to violence when they are provoked by such offences offered to them, by giving them redress at the hands of the Magistrate.

428. From the manner in which Mr. Hudleston and some others speak of these Clauses regarding insult and annoyance by words, &c. and of the additional work which they suppose such enactment would bring upon the Magistrates, it might be thought that there was nothing of the kind in the existing Regulations for the guidance of the Magistrates in the Provinces. Whereas by the Regulations of all the Presidencies the Magistrates are expressly empowered to take cognizance of complaints of abusive language and calumny and other such petty offences, and to punish the offenders, in the Bombay Presidency by imprisonment to the extent of six months, or fine, or both; in the Presidencies of Bengal and Madras by imprisonment not exceeding 15 days, or fine to the amount of 50 Rupees in ordinary, and to the amount of 200 Rupees when the offender is of superior condition.

Bengal Reg IX 1793, Sec 8
Madras Reg IX. 1816, Sec 34
Bombay Reg XIV. 1827, Sec 29, Cl 2.

429. The illustration (*b*) under Clause 485 noticed by Mr. Hudleston is obviously intended to exemply the 2d explanation subjoined to that Clause which Mr. Hudleston finds fault with as "not very clear." The explanation intimates that although the making of an imputation may not amount to the offence of defamation, and may therefore not be punishable under Chapter XXV. it may however be an offence under Clause 485, as being made with the intention of insulting. In the case stated in the illustration the offender would be punishable under Clause 197 if the Magistrate were sitting as a Court of Justice.

430. We propose to introduce into Clause 487 the words "or who "intrudes upon the privacy of any person," and to make the same addition to Clause 486 substituting "any woman" for "any person." This modification of the two Clauses we think advisable on general grounds. And it will make Clause 487 serve instead of Clause 285, as far as appears requisite, in the case of a person wantonly approaching a place where another is preparing his food, or where it is kept ready for use, intending thereby to make it unfit for his use according to the rules of his caste.

431. Colonel Sleeman proposes that a Clause be added to this Chapter against combinations to prevent any person following any trade which he is by law authorized to follow, &c. It appears to us that this offence is sufficiently provided for by Clause 95, concerning abetment by conspiracy, by which all engaged in the combination would be liable to the punishment provided for criminal intimidation.

432. We have had occasion in considering the terms of Clause 482 in this Chapter, to recur to the definition of "trespass" proposed in

para. 627 of our first Report, and upon this revision it has appeared to us advisable to give the definition a wider scope. We would recommend that it be modified as follows, and that it be substituted, as modified, for Clause 418.

"Whoever enters, or causes any person, animal, or thing, to "enter upon or into any property, or does any thing to any property "affecting it corporeally, by his own direct act, or by the intervention of "another person involuntarily impelled by him, or by means of any "animal or thing caused by him to act upon it, not having a legal right "independent of the consent of any other party, so to enter upon or into "or to act upon such property, and not having the consent, express or "implied, of any party legally entitled to give a consent, which would "authorize such entrance or action, is said to trespass."

CHAPTER II.

OF PUNISHMENTS.

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433. The punishments provided by the Code are:

First, Death.

Second, Transportation.

Third, Imprisonment, rigorous and simple.

Fourth, Banishment from the Territories of the East India Company.

Fifth, Forfeiture of Property.

Sixth, Fine.

434. The forfeiture of *all property* is a punishment confined to one class of offenders, that is, to persons waging or attempting to wage war against the Government, or previously abetting that high offence (Clause 109). The forfeiture of *specific property* is authorized by one Clause only (115) for the offence of using the Company's Territory for the purpose of making preparation to commit depredations on the Territory of a power at peace with the Government, &c. The punishment of banishment is also confined to special cases. There are only three Clauses (113, 114 and 290) in which it is authorized primarily as the proper punishment of the offence. These two kinds of punishment may therefore be considered *extraordinary*.

DEATH. 435. Of the punishments which may be considered the *ordinary* punishments of the Code, the first is Death. It is confined to cases in
Clause 300 which murder has been committed (including the case of a person who
306. aids a child, or one who is of unsound mind, or in a state of intoxication,
380. to commit suicide, and the case of murder in Dacoity, which being committed by one of a gang of Dacoits, every member of the gang is liable to the punishment of murder,) and the highest political offence,
109. that of waging war, &c. against the Government.

436. The second punishment, transportation, may be substituted for death in all the capital cases. It is not allowed for any term short of life, except in one instance under Clause 205, in the case of a person returning from banishment, and then banishment for life is to be added. It is also permitted as a commutation, under the orders of Government, in the case of European offenders condemned to long terms of imprisonment. It is the specific punishment for persons returning from transportation for a term of years before the expiration of the term (203), or returning from transportation and banishment, the sentence not having been remitted (204). It is the primary punishment for the offences specified in the following Clauses, viz. 117, 123, 191, 308, 311, 320, 322, 343, 356, 379, 391, 414, 428.

TRANSPORTATION

43.

437. The third mode of punishment, imprisonment, is of two kinds, rigorous and simple. Under this head we may distinguish 25 classes.

IMPRISONMENT.

NOTE—In the following enumeration of the offences liable to imprisonment, where the imprisonment is rigorous it is denoted by the letter R, where it is simple by the letter S. Where there is no mark the imprisonment may be of either description.

438. The first four classes comprise offences, which are liable to imprisonment which must be for life, or which may extend to life, but may be limited to shorter periods, viz.

1. Imprisonment for life.
2. May extend to life, and must not be for a less term than 7 years.
3. May extend to life, with a minimum of 3 years.
4. May extend to life, without a minimum.

439. In all the capital cases but one, imprisonment to endure for life (1st Class) may be substituted for death; in that one (Clause 380) the imprisonment may be for a term not less than 7 years (2d class).

R
109-300-306.
R
380

440. In all cases, but one, in which transportation is the primary punishment, imprisonment for life, or for a term of years, may be substituted. In that one, Thuggee, the imprisonment must be for life. In seven cases the imprisonment may be for life, or for a term not less than 7 years (2d class). In four cases, the minimum is three years (3d class). In one case there is no minimum (4th class).

311.
R.
191-308-320-322-343-356-414.
R.
117-379-391-428.
123

441. There appears to be one case only in which imprisonment which may extend to life is the specific punishment for the offence—in this case the minimum is seven years.

362.

442. The remaining 21 classes comprising offences liable to imprisonment for terms of years, or shorter periods, are exhibited in the following Table.

Class.	*Terms of Imprisonment.*	*Clauses in which the Offences are specified.*
5	May extend to 14 years and must not be less than 2 years, ...	110 115 302 307 357 360 361 371 R 373 377 415 444 447 448 449 450 451 466
6	May extend to 14 years and must not be less than 1 year,.....	R 321 324 413
7	May extend to 14 years without a minimum, ...	301 303
8	May extend to 10 years with a minimum of 6 months,.....	319
9	May extend to 7 years and must not be less than 2 years, ...	233 235 237 239 241 244 245
10	May extend to 7 years and must not be less than 1 year, ...	111 116 119 122 190 217 218 219 R R 220 221 275 ~~365~~ 367 372 ~~374~~ 378 R 381 398 445
11	May extend to 7 years and must not be less than 6 months,.....	412 438
12	May extend to 5 years,.....	133
13	May extend to 3 years and must not be less than 1 year,.....	247 250 252
14	May extend to 3 years and must not be less than 6 months,.....	118 162 232 234 236 238 240 243 276 R 346 365 ~~366~~ 385 388 416 446 452 457 468 484
15	May extend to 3 years and must not be less than 3 months,.....	434
16	May extend to 3 years,.....	S S 94 113 114 121 138 140 146 309 312 R 323 364 369 387 390 406 407 408 409 410 435 440
17	May extend to 2 years,.....	S 130 132 141 142 144 195 199 201 S 291 292 293 304 334 347 348 349 384 395 396 403 404 405 430 431 S 439 443 453 458 479 480 481 483 486

Claus.	*Term of Imprisonment.*	*Clauses in which the Offences are specified.*
18	May extend to 1 year and must be less than 3 months, ...	246 248 249 251
19	May extend to 1 year, ...	108 120 136 143 145 (S) 184 186 193 194 196 253 254 255 256 278 280 282 283 290 (S) 318 326 333 338 350 370 394 397 411 426 456 459 460 467 (S)
20	May extend to 6 months, ...	105 107 125 129 139 (S) 158 159 160 163 166 171 173 197 206 (S) 222 257 258 259 260 261 262 263 265 266 267 268 269 270 271 272 273 284 327 401 402 454 465
21	May extend to 3 months, ...	124 126 147 148 (S) 150 161 164 175 179 209 210 212 213 (S) 214 223 224 225 288 289 (S) 342 364 485
22	May extend to 2 months, ...	178
23	May extend to 1 month, ...	135 (S) 152 153 155 156 157 168 170 177 181 182 264 286 325 332 351 352 358 (S) 425 463 487
24	May extend to 24 hours, ...	488 (S)
25	Imprisonment—the duration of which is to be determined proportionally with reference to that which is authorized or prescribed for another connected offence, ...	90 93 101 102 106 329 335 336 337 344 345 429 433 437

443. "Fine," say the authors of the Code, "is one of the most "common punishments in every part of the world, and it is a punish- "ment the advantages of which are so great and obvious that we "propose to authorize the Courts to inflict it in every case, except where "forfeiture of all property is necessarily part of the punishment." Thus in every penal Clause, except Clause 109 which involves forfeiture, fine is prescribed positively as the punishment, or authorized as an alternative or additional punishment.

FINE. Note A, p. 5.

444. The following are the Clauses specifying the offences for which fine is the sole punishment, the fine being limited in all but one (Clause 226,) viz. 149, 211, 215, 216, 226, 227, 228, 242, 274, 285, 287, 400.

445. In 170 cases fine may be inflicted as the *alternative* for some other punishment; in most of these it may be *added* when the other punishment is adjudged as the principal one. In all other cases, except Clause 109 which involves the forfeiture of all property, fine may be *added* at discretion to the principal punishment, whether that be death, transportation, banishment, or imprisonment.

291 to 293

265 to 273

107-158-161-197-206-225-261 to 263-283-318-327-339-350-426 485.

446 The number of cases in which the fine is limited appears to be 70. The maximum is 5,000 Rupees which is authorized in three cases only, of offences relating to the Press. In nine cases the fine may extend to 2,000 Rupees, the offences being such as indicate a want of due regard for human life. In sixteen cases the limit is 1000 Rupees. The lower gradations are 500 Rupees, 200 Rupees, and 100 Rupees.

161 225-485

447. In the cases in which the maximum fine is 5,000 Rupees the alternative imprisonment may extend to 2 years. In all cases in which the maximum fine is 2,000 Rupees the alternative imprisonment is limited to 6 months. In five cases in which the maximum fine is 1,000 Rupees the alternative imprisonment may extend to 1 year, in eight cases it may extend to 6 months, in the rest it is limited to 3 months

PUNISHMENTS IN THE DIGEST OF THE ENGLISH CRIMINAL LAW

Art 8, Chap XXIV

448. The Commissioners on the Criminal law of England in the Digest, submitted with their 7th Report, propose a scheme of penalties consisting of 45 classes to be substituted for the numerous varieties of punishment which now obtain. These may be reduced to four principal heads, viz. death, transportation, imprisonment, and fine.

p 96.

Art 7, Chap XXIV.

449. The Commissioners in their Report recommend the abolition of forfeiture, but there is a proviso in the Chapter of Penalties which continues it by declaring that the classes of penalties therein set forth "shall not be deemed to affect any law concerning forfeiture or any "other collateral consequence to which an offender is now liable on a "conviction of any offence which is an offence under this Act," which proviso is retained in the Draft Act relating to offences against the person appended to the 2d Report of the present Commissioners on the Criminal Law. The Commissioners in their 7th Report, express an inclination to reject altogether the punishment of whipping except in the instance in which it has lately been imposed by the Legislature as

p 108

5 and 6 Vic C 51

constituting a signal mark of ignominy. It still appears however in some of the classes of penalties as a punishment which may be added to the principal one if the Court shall think fit.

Discharging or aiming fire arms, &c. with intent to injure or alarm the Queen.

450. "Capital offences below the degree of treason," say the English Criminal Law Commissioners, "are now founded almost wholly "on the principle that they involve either the wilful destruction of "human life, or the wilful exposing it to peril." Such are the following which the English Law punishes with death:

DEATH.
7th Report, p. 96.
Treason Class 1.
Murder &c. 2.

1. Murder.
2. Attempting to commit murder by administering poison or by wounding, &c.
3. Burglary aggravated by assault with intent to murder, &c.
4. Robbery with wounding.
5. Piracy aggravated by assault with intent to murder any person on board the vessel in respect of which the piracy is committed.
6. Setting fire to a dwelling house any person living therein.
7. Destroying vessels with intent to murder.
8. Exhibiting false lights, &c. with intent to bring a vessel into danger, &c.

451. The only offences not falling within the above category which are punishable with death are—

9. Destroying Ships of War, Royal Arsenals, &c.
10. Unnatural offences.

452. The classes of transportation are as follows:

TRANSPORTATION.

Class 3. For life positively.

4 to 8. For life, or any term not less than 7 years.

9 to 12. For a term not exceeding 15 years, and not less than 7 years.

13 and 14. For a term not exceeding 10 years, and not less than 7 years.

15 to 17. For the term of 7 years.

453. In all but one class (the 4th) imprisonment for a term not exceeding 3 years may be inflicted as the alternative in lieu of transportation for life or for any shorter term. In two classes (5th and 9th) the imprisonment must not be for less than 1 year. In three classes (8th, 11th, 16th,) fine may be substituted for transportation, instead of imprisonment; in two of these (11th and 16th) fine may be added to

imprisonment. In four classes (6th, 10th, 13th and 15th,) the offender may be sentenced to whipping in addition.

IMPRISONMENT.

454. The longest term of imprisonment as a substantive punishment is 3 years. The classes are as follows :

Class 18. For a term not exceeding 3 years, and not less than 1 year.
19. Not exceeding 3 years, and not less than 6 months.
20 to 22. Not exceeding 3 years.
23 to 26. Not exceeding 2 years.
27. Not exceeding 18 months.
28. For 1 year.
29 to 31. Not exceeding 1 year.
32 and 33. For 6 months.
34 and 35. Not exceeding 6 months.
36 to 38. For 3 months.
39 to 41. Not exceeding 3 months.

455. In four classes 20th, 32d, 36th and 37th, fine must be added to imprisonment; in the first of these classes the fine is unlimited, in the rest it is limited. In several classes 31st, 24th, 25th, 27th, 29th, 34th, 39th, fine may be substituted or added; in one only of these classes (25) the fine is limited; in two classes fine may be substituted but not added, (31st and 41st) the fine being limited.

FINE.

456. There are four classes of penalties consisting of fine simply, viz.,
Class 42. Fine at discretion.
„ 43. Fine of 500£.
„ 44. Not exceeding 100£.
„ 45. Fine of 40£.

457. With the classes in which fines are authorized as alternative or additional to imprisonment, there are altogether twenty-one classes in which fine is prescribed or authorized as a punishment. In ten the amount of fine is limited, in eleven it is left to discretion.

PUNISHMENTS OF THE CODE. DEATH.
Note A, p 1.

458. With respect to the punishment of death, the authors of the Code anticipated that many persons might think they had erred in restricting it to cases in which either murder or the highest offence against the State has been committed, and might be of opinion that gang robbery, the cruel mutilation of the person, and possibly rape, ought to be liable to capital punishment. We find the extension of capital

punishment to gang robbery advocated by several Officers of the Madras Presidency, particularly by Mr. Kindersley, Mr. F. M Lewin, Mr. S. Scott, Mr. J. J. Cotton, and Mr. E. Maltby, and by an experienced and intelligent Native Officer, Tambusawmy Moodily. Mr. J. F. Thomas would extend the penalty of death to convicts returned from transportation. Mr. E. Maltby would include under the punishment of death, besides gang or torch robberies at night accompanied by wounding, the offences of setting fire to dwelling houses, and the pollution of mosques for the purpose of creating popular disturbances, as loss of life is generally a consequence of such acts. In the last suggestion Mr. F. N. Maltby concurs.

459. Mr. A. D. Campbell states that "the gravest doubts have "arisen in his mind of the efficacy of death as a punishment, especially "in India." After mentioning general grounds for these doubts, he observes that in 1830 the Madras Sudder Foujdaree Adawlut issued an order requiring the Officers executing death warrants to record the impressions made by the execution in every case, in order to assist a judgment of the effect of such examples, and that having examined these records for several years, their perusal has strongly confirmed him in the doubts he before entertained. He notices particularly some remarkable reports by the Native Judge of Vizagapatam of executions superintended by him, as exemplifying the power of superstition in annihilating the dread of this punishment, observing that "where superstition prevails to "such a lamentable extent as this, death, the last sentence of the law, is "robbed of all its terrors. The people collected by idle curiosity, or by "that inclination for spectacles of any kind which characterizes Indians, "sympathize with the expiring criminal, as a sacrifice to fate—purified "by the extreme unction of the ruling power—and the lamentable scene "exhibited (by the Native Judge) with a truth which none but a "Native was capable of portraying, closes with an interchange of civili-"ties between the spectators and the dying culprit." "The apathy "exhibited by the spectators," he remarks, "is greatly exceeded by that "displayed by the culprits themselves." On the whole however Mr. Campbell says, "I am not prepared, on this subject, to recommend any "alteration in the law itself; but its administration should I think be "greatly modified. The Executive Government should take the punish-"ment of death more into its own hands with the view of gradually "diminishing the number of capital executions, increasing their solem-"nity and effect, and organizing a system for the occasional revision "of capital sentences."

460. The Officers who propose to extend capital punishment, as above mentioned, entertain generally a lighter opinion of the efficacy of

the punishment of transportation than that which is expressed by the authors of the Code. Mr. Kindersley observes that "the feeling of "horror for it is beginning to wear off, from the accounts of Sepoys "and escaped Convicts, a fact best proved by the general emigration to "Mauritius and the Eastward." Tambusawmy Moodily has observations to the same effect, adding that "the mystery is gone by." Mr. Vaughan says, "With regard to the 'Black Water' which the Commissioners view "as so terrible to the Native, I believe that they will find that the "march of intellect and of Troops to the Eastern settlements has "extended the information of those of the Madras Presidency (at any "rate) on these matters considerably. Still I believe it is more dreaded "than death by men of high caste, while others may hear of the ease "and independence which (Officers who have been to the Eastward "have described it to me) afford quite a burlesque on severe punishment." Mr. F. N. Maltby mentions that "two Regiments lately returned from "the Eastward have been stationed in this district (Canara), and have "brought information of the manner in which the prisoners in the penal "settlements live, and of the wages they receive as private servants, "which must deduct from the terrors of the punishment, especially in "a maritime province."

Report to the Governor General of India in Council, dated the 8th January, 1838

Para. 216.

461. The Committee upon Prison Discipline while they recommended the retention of the punishment of transportation, as a punishment which "in this country and at the present time, while it causes less "pain excites among the great mass of the people greater terror than "imprisonment for life," admitted, however, that "at the capital of the "Presidencies where transportation for terms of years is a common "punishment, the feeling is not the same." "Probably also," they observed, "in the neighbourhood of all sea-ports the feeling is generally "less strong than it is with the mass of the people. Seafaring people "have undoubtedly none of this peculiar feeling. But those who fall "within these exceptions form but a small portion of the population of "British India. Nevertheless," they continued, "they are sufficiently "numerous to prevent our arguments" (in favor of this mode of punishment in comparison with imprisonment for life) "from applying with "their full effect universally. Yet our arguments apply to their full "extent so generally, that if the Government should coincide in our "views, in order to make the most use by way of example of the same "actual infliction, the penalty of transportation for life ought to be "generally preferred to that of imprisonment for life for the most "heinous offences not punished with death." Adverting to communications received from Madras by the Indian Law Commissioners "complaining of the laxity of discipline amongst the prisoners in the Straits, and

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" stating that in consequence of the agreeable life which the convicts " there lead, the terror of transportation has greatly diminished in some " maritime parts of the country," the Committee observed that " this is " a great evil, but that it arises chiefly from the mismanagement of the " convicts, and the remedy is very simple."

462. We think that the authors of the Code have given very cogent reasons for not punishing with death any crime against the person which stops short of murder. They argue that " to put robbers, " ravishers and mutilators on the same footing with murderers is an " arrangement which diminishes the security of life." Offences of this kind they observe, " are almost always committed under such circum- " stances that the offender has it in his power to add murder to his guilt. " They are often committed under such circumstances that the offender " has a temptation to add murder to his guilt. The same opportunities, " the same superiority of force which enabled a man to rob, to mangle, " or to ravish, will enable him to go further and despatch his victim. As " he has almost always the power to murder he will often have a strong " motive to murder, in as much as by murder he may remove the only " witness of the crime which he has already committed. If the punish- " ment of the crime which he has already committed be exactly the same " with the punishment for murder, he will have no restraining motive." Note A, p 1

463. It is probably true that the punishment of transportation is less dreadful to some classes of the Natives than it was, for since multitudes of free persons have been in the habit of shipping themselves to Mauritius, and even to the West Indies, and returning from time to time, it is to be supposed that the horror of the " black water" which principally made it awful, has greatly abated. It is true too that the people who are most apt to engage in gang robberies are among those who have learnt to regard this incident in the punishment of transportation which formerly had so powerful an effect, with comparative indifference. Still there is reason to believe that with the many who have not been in the way to become familiar with the idea of passing the sea as a common event, the dread of it still prevails to a degree that makes a sentence of transportation a terrible punishment. And even without this aggravation there is enough we conceive in a perpetual exile in a foreign land and a perpetual separation from all persons and things which have been through life the objects of interest to a man, with perpetual privation of all indulgences, under a rigid discipline such as ought to be maintained in a penal settlement, there is enough we conceive in these essential incidents of the punishment of transportation to make it always very formidable and of powerful efficacy. But were it less so than we suppose,

and were it evident with respect to gang robberies in particular, that men are not to be deterred by the fear of it from committing this kind of offence, which is unquestionably a very atrocious one, and extremely alarming to the peaceable people liable to be victims of it, we think it would not be justifiable to try the experiment of putting it down by resorting to capital punishment, for even supposing that the experiment should be partially successful, that the number of gang robberies should be diminished, which is a matter of speculation, there would be a great risk of the offence being aggravated by acts of greater atrocity whenever it should be committed, the offenders being rendered desperately reckless, and their ferocity exasperated, by the consciousness of their liability to death at all events.

464. This objection does not apply to visiting with capital punishment convicts returning from transportation for life; and considering the importance of keeping up the impression that this punishment absolutely precludes the hope of returning, that it cuts off the criminal from any chance of future intercourse with his kindred and connections, and re-appearing on the scene of his former active life, as effectually as if he were removed by death, especially in the case of notorious Dacoits who have been the terror of a country, we see some reason for hesitating with respect to such heinous criminals at least, to abolish the powerful bar which the fear of death opposes to their attempting to escape from transportation. At present a convict returning from transportation is liable to suffer death by the law in force in the Supreme Courts in India, (though the offence is no longer capital in England) and by the Regulations of Bengal and Madras, but not by the law of the Bombay Presidency.

465. But though what appears to us a very strong, indeed a conclusive objection, to punishing such crimes as gang robbery with death, does not apply to the case of a convict returned from transportation, and we recognize a reason of some force for making that offence capital in respect to convicts *under sentence for such crimes*, in order to give the utmost efficacy to the punishment of transportation, yet on the whole we are of opinion that the line drawn by the framers of the Code, by which the punishment of death is confined to cases where either murder or the highest offence against the State has been committed, ought to be maintained.

TRANSPORTATION.

466. With respect to transportation, from the absence of objection it may be concluded that there is a general consent to the principle that this punishment shall be invariably for life.

467. The authors of the Code express a hope that it will shortly be found practicable to reduce the terms of imprisonment proposed by them through the introduction of an improved system of prison discipline. They seem to have anticipated that the terms might be reduced to about one half, that one year's confinement under a good system of discipline would generally prove as efficacious as confinement for two years under a lax one. Mr. J. F. Thomas recommends that the terms of imprisonment be reduced at once. He says, "To a people who, in nine cases out "of ten, cannot compute time; who know not whether their children "were born ten, twelve, or fourteen years back, nor their own age— "when the friends and associates of a prisoner cannot tell, in the "majority of cases, whether he has been respectively 6 or 7, or 10 or 14 "years in Jail—the long terms of imprisonment provided for by the Code, "appear to me the infliction of so much needless pain—and except in the "case of notorious offenders, as leaders of gangs, or persons detained "on security for the peace of the district, an useless expence entailed on "Government. The only notion of the punishment the criminal can "now form, is, that it has been a long separation from his home; and that "idea is as strong, when the imprisonment has been ten, as when it has "been fourteen years. I almost think it indeed demonstrable in the case "of offenders of the uneducated classes, who probably constitute nine-"tenths of the criminals, that 6, 8, and 10 years are respectively, as "effective penalties, as 7, 10, and 14 years; and that the terms of "imprisonment now provided, should therefore be reduced." Mr. Thomas would leave the present terms only in the cases of suborners of perjury or forgery, leaders of dacoits, and similar offenders of great criminality, or more raised in society. Mr. Vaughan also recommends that the terms of imprisonment be reduced, with greater rigour during imprisonment.

IMPRISONMENT.
Note A, p 2

468. We agree with the authors of the Code that whenever a Code of prison discipline shall be brought into operation which, without shocking the humane feelings of the community, may yet be a terror to the most hardened among them, it will be advisable greatly to shorten many of the terms of imprisonment.

469. We have noticed that it is only in one case that imprisonment which may extend to life is prescribed positively as the specific punishment of the offence. In all other cases imprisonment which may extend to life, is authorized as the alternative for transportation for life. In awarding punishment in these cases, we are of opinion, with the Committee on prison discipline, that the penalty of transportation for life ought to be generally preferred to imprisonment for life, indeed that this alternative should not be resorted to but for special reasons, referring to

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age, sex, infirmities, &c, rendering transportation an unfit punishment in particular cases.*

470. While imprisonment for life, or which may extend to life, is the alternative for transportation for life by the Code, the Digest of the English Law fixes three years as the maximum term of imprisonment to be inflicted in the alternative for transportation for life, or for any term of years. The Commissioners observe that "were the alternative terms of "imprisonment to be regarded as equivalents, to be substituted at discre-"tion for another species of punishment, our recommendation would "involve inconsistencies; for, if imprisonment for three years were to be "regarded as a proper equivalent for fifteen years' transportation, the "same term of imprisonment could not be a proper equivalent for either "a higher or lower maximum of transportation. Such terms of impri-"sonment, however, are not meant as equivalents, but simply as "alternatives to be adopted at the discretion of the Court. Upon this "subject it is proper to observe, that where imprisonment may be "inflicted as a lower and alternative punishment, it is by no means "necessary, but that on the contrary it would be inconvenient, that the "highest alternative punishment by imprisonment should be proportion-"ed to the highest alternative of transportation. It is desirable that "whatever be the extremes of punishment, there should be no such "chasm as might exclude the infliction of any such intermediate degree "of punishment as the exercise of discretionary authority might require. "If, for example, the extremes of punishment were in one case to be "transportation for life and imprisonment for one year, but, in another "instance, transportation for fifteen years and imprisonment for one "year, it is obvious that, as it was in common to the two offences that "the punishment should be varied at discretion from fifteen years' "transportation to one year's imprisonment, the discretionary power "within those limits should be the same in both cases. This, however, "could not be, if in the one case imprisonment for four years might be "inflicted, whilst in the other the highest alternative of imprisonment "was restricted to three years. A common maximum of the interme-"diate alternative punishment is not only proper for the purpose of "preserving a continuity in the scale of punishment between two "extremes, but is also advisable for the purpose of affording a wider "discretion as to the kind of punishment in reference to the circum-"stances of each particular case."

7th Report, p. 103.

* Act XIV of 1844 directs that whenever a Sudder Court shall sentence an offender to imprisonment for life, it shall at the same time sentence such offender to transportation for life, unless there be special reasons inducing the court to think he is not a proper subject for transportation

471. We confess we are not satisfied by this reasoning, that there should be one maximum term for imprisonment when it is inflicted in the alternative for transportation for life, and when it is inflicted in lieu of transportation for 7 years. And we do not know how the argument is to be reconciled with what is stated in the following paragraph, in which the Commissioners say "the terms of imprisonment proposed as alter-" natives for the shorter terms of transportation are not, we feel assured, " of longer duration than is necesssary for affording room for the exercise " of a sound discretion," but "the length of the highest alternative term " of imprisonment might, we think, have been conveniently extended." Here they seem to intimate an opinion that when imprisonment is substituted for transportation the term of it should bear some proportion to the term of transportation, at least that the term should be longer when it is substituted for transportation for life, or a long term of years, than when it is substituted for transportation for a short term of years. The reasons which they give in this place for not extending the highest alternative punishment is simply that they regard certain late enactments " as a legislative declaration, that no alternative term of " imprisonment ought to exceed three years."

472. In the Indian Code imprisonment as a substantive punishment occupies the place of transportation for terms of years in the English law. The Digest, as we have seen, limits the term of imprisonment when it is inflicted as a substantive punishment as well as when it is substituted for another penalty, to 3 years. By late intelligence from England, it would seem to be intended to substitute imprisonment for transportation to a great extent, without prolonging the maximum term.

BANISHMENT.

473. We have remarked that there are only three Clauses (113, 114, and 290) in which banishment from the Territories of the East India Company is authorized as the primary punishment of offences. In commenting upon Clause 113 we reserved our opinion upon the propriety of the punishment of banishment for the offence of "attempting to excite feelings of disaffection to the Government" therein defined, until we should have maturely considered the Chapter of Punishments. We have now to submit our opinion that it would be an unwarrantable severity to inflict the punishment of banishment for life upon a Native of the Territories of the East India Company constantly domiciled there from birth, for the offence in question. Probably the extreme penalty of banishment *for life* was not intended to be applied to persons of this description, but to temporary inhabitants. It might perhaps be some times politically expedient to banish a temporary inhabitant, convicted of attempting to excite disaffection to the Government, for life. But we

Ante para. 27

do not think it consistent with the principles upon which the penal provisions of the Code have been constructed generally, to extend the punishment beyond the measure of the offence upon any such consideration. We think the punishment of banishment is a fit punishment for the offence, but we would recommend that the term be limited to 5 years, as the term of simple imprisonment, which may be inflicted in the alternative, is limited to 3 years.

FINE.

Note A, p 5.

474. Upon the subject of fine, the authors of the Code observe that in imposing it as a punishment "it is always necessary to have as much "regard to the pecuniary circumstances of the offender as to the "character and magnitude of the offence." "It is impossible to fix any "limit to the amount of a fine which will not either be so high as to be "ruinous to the poor, or so low as to be no object of terror to the rich. "There are many millions in India who would be utterly unable to pay "a fine of fifty rupees; there are hundreds of thousands from whom "such a fine might be levied, but whom it would reduce to extreme "distress; there are thousands to whom it would give very little "uneasiness; there are hundreds to whom it would be a matter of "perfect indifference, and who would not cross a room to avoid it. The "number of the poor in every country exceeds in a very great ratio the "number of the rich. The number of poor criminals exceeds the "number of rich criminals in a still greater ratio. And to the poor "criminal it is a matter of absolute indifference whether the fine to "which he is liable be limited or not, unless it be so limited as to render "it quite inefficient as a mode of punishing the rich. To a man who "has no capital, who has laid by nothing, whose monthly wages are just "sufficient to provide himself and his family with their monthly rice, it "matters not whether the fine for assault be left to be settled by the "discretion of the Courts, or whether a hundred rupees be fixed as the "maximum. There are no degrees in impossibility. He is no more "able to pay a hundred rupees than to pay a lac. A just and wise "judge, even if entrusted with a boundless discretion, will not, under "ordinary circumstances, sentence such an offender to a fine of a hundred "rupees. And the limit of a hundred rupees would leave it quite in "the power of an unjust or inconsiderate judge to inflict on such an "offender all the evil which can be inflicted on him by means of fine."

"If, in imitation of Mr. Livingstone, we provide that no fine shall "exceed one-fourth of the amount of the offender's property, no serious "fine will ever be imposed in this country without a long and often a "most unsatisfactory investigation, in which it would be necessary to "decide many obscure questions of right purposely darkened by every

" artifice of chicanery. And even, if this great practical difficulty did " not exist, we should see strong objections to such a provision in a very " large class of cases. Take the case of a corrupt judge, who has accumu- " lated a lac of rupees by his illicit practices. A fine which should " deprive such a man of the whole of his fortune would not appear to us " excessive. And certainly we should think it most undesirable that " he should be allowed to retain 75,000 Rupees of his ill-gotten gains. " Again: take the case of a man who has been suborned to commit " perjury, and has received a great bribe for doing so. Such a man " may have little, or no property, except what he has received as a bribe. " Yet it is evidently desirable that he should be compelled to disgorge " the whole. No man ought ever to gain by breaking the law; and if " Mr. Livingstone's rule were adopted in this country, many would gain " by breaking the law."

" We have never seen any general rule for the limiting of fine, " which we are disposed to adopt. The difficulty of framing a rule has " evidently been felt by many eminent men. The authors of the Bill of " Rights, with many instances of gross abuse fresh in their recollection, " could devise no other rule than that excessive fines should not be " imposed. And the authors of the constitution of the United States, " after the experience of another century, contented themselves with " repeating the words of the Bill of Rights."

" It will be seen that in cases which are not very heinous we " propose to limit the amount of fine which the Courts may impose. " But in serious cases we have left the amount of fine absolutely to their " discretion; and we feel, as we have said, that, even in the cases where " we have proposed a limit, such a limit will be no protection to the " poor, who in every community are also the many. We feel that the " extent of the discretion which we have thus left to the Courts is an " evil, and that no sagacity and no rectitude of intention can secure a " Judge from occasional error. We conceive, however, that if fine is to " be employed as a punishment, and no judicious person, we are persuad- " ed, would propose to dispense with it,—this evil must be endured. " We shall attempt in the Code of Procedure to establish such a system of " appeal as may prevent gross or frequent injustice from taking place."

475. Blackstone observes on this subject " that the quantum of " pecuniary fines neither can nor ought to be ascertained by an invariable " law. The value of money itself changes from a thousand causes; and, " at all events, what is ruin to one man's fortune, may be matter of " indifference to another's." " Statute law has not therefore often " ascertained the quantity of fines, nor the common law ever." Comm. 4. 377.

476. The English Criminal Law Commissioners in their 7th Report remark, that "the inequality and injustice in some cases, and "the inefficacy in others, of resorting to *fixed and absolute* fines as a "mode of penal restraint confine its adoption within narrow limits, "principally to instances of minor delinquencies punishable by virtue of "a summary jurisdiction, and in some particular instances of higher "magnitude where the condition of the class of person on whom the "restraint operates, is such as to remove, or at least greatly to reduce the "probability that it will operate either with unequal severity, or will be "ineffectual from the inability of those who offend to pay the fine, and "where, in addition, such a mode of punishment is appropriate to the "nature of the offence, and does not afford room for invidious comparison "with other instances in which corporal punishment is inflicted in "respect of less heinous transgressions."

p 107 477. With respect to the discretionary power of punishment by fine, they observe that it does not admit of a limit, "the magnitude of a "fine must in justice be proportioned to the offender's means."

Supra para. 444 478. In respect of the few offences for which by the Code fine is the sole punishment, (none being very serious) the amount of fine is limited in all but one, and while for every other offence in the Code (except one which involves the forfeiture of all property) fine *may* be imposed either as a substitute for other punishment, or in addition, the number of cases in which the amount is limited
446 is no more than 70, the maximum being Rupees 5,000, and there being only 12 cases in which the amount exceeds 1,000 Rupees, and 28 in which it is above 500 Rupees.

446 479. In the Digest, as we have before remarked, out of 4 classes in which fine is the sole punishment, the fine is limited in all but one; while out of 21 classes of penalties in which fine is an ingredient, in 10 the amount of fine is limited, in 11 it is left to discretion. The 25th class is the highest in which the fine is limited, the maximum being 500£ —it is alternative for imprisonment not exceeding 2 years. This class we believe is applicable to a single offence. The next highest class of limited fine is the 31st, in which the maximum is 100£, alternative for imprisonment for 1 year. This also appears to be applicable to a single case. Other classes in which the fine is limited appear likewise to have a special application to particular offences.

Art 14, Sec 5, Chap V. of Digest.

Art 7, Sec 4, Ch VIII of Digest

480. Sir J. Awdry says, "As regards fine I agree that the only "just rule is the indefinite one of the 'Bill of Rights.'" "The investi-

" gation of the amount of a man's property is impossible. The fining to " the whole extent of property acquired by crime is not excessive."

481. Mr. Sharkey has attempted to controvert the reasoning which led the authors of the Code to leave the amount of the fine unlimited in the great majority of the cases to which that punishment is applicable. The conclusion he comes to is that " it will be more " expedient and consistent to do away with it (the penalty of fine) " altogether, and substitute some other penalty for it, than that the " measure of the penalty should be left to the arbitrary and discretionary " power of a Judge, especially so ' an unjust and inconsiderate Judge.' " It appears to us that he has not made out more than is admitted by the authors of the Code, namely, that " the discretion left to the Courts is " an evil." They contend that if fine is to be employed as a punishment this evil must be endured. Rather than it should be endured, Mr. Sharkey would dispense with the punishment of fine altogether, a measure which *they* were persuaded no judicious person would propose. Mr. Sharkey has not suggested any substitute for this punishment, being satisfied of the feasibility of limiting the fine in every case ; and " the " fine being once apportioned to the offence must be considered as found- " ed on its legitimate basis, and like every other limited punishment be " awarded without any hesitation, whatever the circumstances of the " offender might be."

482. Mr. Vaughan " protests against the high estimation of the " great and obvious advantage of fine expressed by the Commissioners " in page 5 of their notes," and " wonders how they came to the " resolution of proposing fines in every case, &c." It is to be observed here that fine is not *proposed* but *authorized* in every case, an observation which obviates the objection that Mr. Vaughan appears to ground upon the extreme poverty " of the millions" in India. Mr. Vaugham would narrow the application of fine very considerably—" I would " propose," he says, " fine commutable (if not paid) to private but rigorous " imprisonment for cases of offence of a slight and palliable nature " committed by those not previously convicted of any, and for those " only." He extends this afterwards by suggesting that " heavy fines " at the discretion of the Court should also be adjudged for the use " of Government in cases of extortion, corruption, forgery, and all " offences relating to coin, gang robbery, considerable thefts, and " receiving stolen property, such being cases arising from cupidity, " beyond the petty theft which proceeds from sudden temptation or " idle habits." " In all cases below those which demand transporta- " tion or death and confiscation of property," he thinks " rigorous

" imprisonment should be imposed, and fine should be added (without " reference to the means of the offender) for reimbursement to the " prosecutor for the loss of property sustained, or for remuneration on " account of damage to his person." In the slight cases for which he thinks fine the fitting punishment he would limit it, " *not to exceed* two " Rupees in the case of any living by daily labour or as a petty cultivator; " five Rupees on any petty farmer or shop-keeper; half a month's pay " for any one receiving wages; and in no case whatever to exceed 500 " Rupees; drawing out the gradation even more minutely." " Offences " which Zemindars and other men of property are likely to commit in " contempt of authority, &c., may be distinctly stated, and the punish- " ment fixed in fines to a large amount." Further he says, " Let fine " stand as a part of the punishment which *may* be imposed for theft, but " let it be declared that the Courts should sentence to fines *for the use* " *of Government*, those only who may be reputed to have made large " gains by dishonest means. Let claims to *their* property be rigidly " scrutinized; but as to the mass of offenders, I hold that general fining " and power to levy within six years is most inexpedient, cruel to the " families, and mischievous to the general peace."

483. Mr. J. F. Thomas observes, that " the penalty of unlimited " fine so frequently provided gives the Courts enormous power open " to great abuse over the wealthy classes, who would suffer any thing " rather than the degradation of imprisonment in the Common Gaol." This objection seems to us to be hardly tenable, for if oppression were the object (and we do not see what other there could be in the wilful imposition of an excessive fine which must be accounted for) that object could be better accomplished by sentencing the party at once peremptorily " to the degradation of imprisonment in the common Gaol" so much dreaded by the wealthy classes. Mr. Thomas points out as an example of possible abuse, in another direction, of the discretionary power of fining, that under Clause 390 an habitual receiver of stolen property might be let off with " a very trifling punishment, a fine possibly of " trifling amount." He thinks that " in such cases the law should specifically provide for the infliction of the highest penalties, not leaving it to individual judgment." The offence in question, it will be remarked, is one of those " arising from cupidity," which Mr. Vaughan would have visited with heavy fine at the discretion of the Court. Certainly if a limit should be set to the fine by law it must be a high one. The Clause now authorizes imprisonment which may extend to 3 years or fine or both. The fine could not be limited to less than 1,000 Rupees, an amount which every one must acknowledge to be utterly inadequate in the case of one proved to have gained, it may be, tens of thousands, by his

dealings with gangs of robbers, and equally in excess in the case of a petty dealer, who on some occasion may have received stolen goods from the hands of a thief, the value being a trifle. We cannot think that Mr. Thomas on reflection would desire that the law should not leave it to the discretion of the Court to inflict any but *the highest penalty* of imprisonment or fine, that is, imprisonment for 3 years, or fine, say to the amount of 1,000 Rupees, in such a case.

484. Mr. G. W. Bacon objects to Clause 50, because "it leaves too "much to the discretion of the Judge, like the English law regarding the "punishment of manslaughter, and also because under the Code fines are "limited and unlimited in amount without any reason whatever, and "without any reference to the nature of the offence. Examples of the "kind are innumerable." In another place he says, "In page 6 of the "Notes, I find it was intended that serious cases alone called for unlimited "fine, but I have found many instances of it being made the punishment "of very trifling offences."

485. Certainly reasons are not given in every case in which the fine is limited, for applying a limitation, nor in every case in which it is unlimited, for dispensing with a limitation; to have done so would have been both cumbrous and inconvenient: but it is not to be concluded because reasons are not assigned, that the arrangement was made arbitrarily. In the instances cited by Mr. Bacon, the arrangement appears to us evidently systematic and referrible to principle. As to unlimited fine being authorized for very trifling offences, as Mr. Bacon alleges, we apprehend it will be found that though the offences may ordinarily be not very heinous, yet they are occasionally aggravated to a degree that renders it necessary to give power to the Courts to enhance the punishment by adding fine at discretion to the primary penalty, which is probably imprisonment limited to a short term.

486. We do not pretend to affirm that the authors of the Code have always been successful in drawing the line in the matter of fines. We have ourselves suggested amendments here and there, sometimes to remove the limitation proposed by them, sometimes to introduce a limitation where they did not think it necessary, sometimes to extend the limitation. But after a very close examination of the whole Code the instances in which we have seen reason to suggest alterations are far from numerous.

487. Having explained their provisions for the imposition of fines, the authors of the Code proceed to state the arrangements they propose

to be observed in default of payment. "We propose," they say, "that "at the time of imposing a fine, the Court shall also fix a certain term "of imprisonment. In fixing this term, the Court will in no case be "suffered to exceed a certain maximum, which will vary according to the "nature of the offence. If the offence be one which is punishable with "imprisonment as well as fine, the term of imprisonment in default of "payment will not exceed one-fourth of the longest term of imprison-"ment fixed by the Code for the offence. If the offence be one which, "by the Code, is punishable only with fine, the term of imprisonment for "default of payment will in no case exceed seven days."

"But we do not mean that this imprisonment shall be taken in full "satisfaction of the fine. We cannot consent to permit the offender to "choose whether he will suffer in person or in his property. To adopt "such a course would be to grant exemption from the punishment of "fine to those very persons on whom it is peculiarly desirable that the "punishment of fine should be inflicted, to those very persons who "dislike that punishment most, and whom the apprehension of that "punishment would be most likely to restrain. We therefore propose "that the imprisonment which an offender has undergone shall not "release him from the pecuniary obligation under which he lies. His "person will, indeed, cease to be answerable for the fine. But his
Cl. 57. "property will for a time continue to be so. What we recommend is "that, at any time during a certain limited period, the fine may be levied "on his effects by distress. If the fine is paid or levied while he is im-
Cl 55. "prisoned for default of payment, his imprisonment will immediately "terminate, and if a portion of the fine be paid during the imprisonment,
56 "a proportional abatement of the imprisonment will take place."

57 488. The limited period during which the fine may be levied on any effects of the offender that may be found available is 6 years, a period which we apprehend has been adopted from the English Statute of limitations, and the corresponding provision regarding simple debts in the Bombay Code, and it is provided that the death of the offender (if it takes place within 6 years we presume) does not discharge from liability any property which would after his death be legally liable for his debts It is to be observed, in considering this provision, that the
Note A, p 10. authors of the Code contemplate an arrangement to enable every person who is injured by an offence to obtain reparation for the injury, by making it competent to the tribunal which has tried the offender to award the whole or part of the fine to the sufferer, provided that the sufferer signifies his willingness to receive what is so awarded in full satisfaction of his civil claim for reparation, and if he prefers to sue for

damages in the Civil Court, to make the fine answerable as far as it will go in satisfying those damages.

489. Objections have been made to the proposed provisions on this head in regard to two points chiefly, viz. the limitation of the period of imprisonment in default of payment of a fine when the offence is punishable with fine only, to 7 days, the imprisonment being simple; and the keeping the fine hanging over the offender when he has suffered imprisonment in default of payment, during 6 years, and making it recoverable after his death from any property left by him which would be liable for his debts.

490. With respect to the first point it is observed in the Note, that "if the offender has not the means of paying the fine while he is "subject to it he will be quit for his imprisonment." So also, however, an offender having the means of paying the fine, but his property not being tangible, might be quit likewise for simple imprisonment during 7 days, setting at nought the provision for levying the fine on his effects at a future time, by removing from the place. This would be likely in such a case as is provided for by Clause 287, in which the fine may amount to 1000 Rupees. It is true that the number of offences punishable with fine only as set forth in para. 444 is small, and that the offences are not of much importance, and not in general involving moral guilt. And with respect to some it is probable that the offenders will generally be in circumstances to enable them to pay the fine, and persons who will rather pay the fine than go to gaol for the shortest period. But it may be otherwise. And we cannot but think that a discretion should be given to extend the imprisonment. With respect to two of the offences which the Code makes punishable with fine only (Clauses 242 and 400) we have recommended that they be liable to imprisonment also. P S.

491. On the second point the authors of the Code have anticipated the objection that the proposed rule will operate harshly. They take the case of an offender who, being really unable to pay his fine, lies in prison for a term, and within 6 years after his sentence acquires property, as the only case in which the objection can be made with any plausibility. "Even in this case," they remark, "it is evident that the "proposed law will operate far less harshly than a law which should "provide that an offender sentenced to a fine should be imprisoned till "the fine should be paid. Under both laws imprisonment is inflicted, "under both a fine is exacted. But the one law liberates the offender "on payment of the fine, and also fixes limit beyond which he cannot be

" detained in gaol whether the fine be paid or no. The other law keeps " him in confinement till the money is actually paid. It is therefore at " least as severe as ours on his property, and is immeasurably more " severe on his person." They then observe that by the English law in the case of an insolvent not a trader, where his person is liberated his future acquisitions still continue to be liable to the claims of his creditors. They consider an offender who has been sentenced to fine, " as a debtor, " and as a debtor not entitled to any peculiar lenity," and they conclude that " if a temporary imprisonment for debt ought not to cancel the " claim of the private debtor, neither ought a temporary imprisonment " in default of payment of a fine to cancel the claims of public justice." The analogy of the private creditor will be the more apt and perfect if the arrangement contemplated by the authors of the Code for giving reparation for injury out of the fine imposed upon the offender be adopted.

492. Mr. W. B. Anderson says, "The difficult question, when a " fine has been imposed, what measures shall be adopted in default of " payment? appears to me to have been ably argued by the Law " Commissioners. I think they have clearly shewn why the imprisonment " which an offender may have undergone, should not release him from " the pecuniary obligation under which he lies—and that the offender " who has been sentenced to fine must be considered as a debtor, and as " a debtor not entitled to any particular lenity."

493. Sir J. Awdry thinks that the plan proposed of a limited additional imprisonment and a right still to levy the fine, is better than the indefinite imprisonment of the English law; but he prefers the power of increasing the rigor to extending the term. He conceives that the power of changing simple into rigorous imprisonment would be a very desirable mode of enforcing in many instances the payment of fine, " dwelling on the importance of making him who pays in person because " he cannot pay in purse, work out his liberation within the term of his " original sentence."

494. Mr. Casamajor says, " I do not see on what principle the " liability is here limited to six years; nor is it explained in the Notes. " In the parallel case of civil debtors there is no such limitation. " Quære, might not that parallel be still further applicable to fines? " And when the imprisonment substituted for the fine has been under- " gone, might not the party fined be allowed, like an insolvent debtor, as " a condition of his liberation, to enter into proof that he had bonâ fide " given up all his property. In case he did satisfactorily prove this,

" he might be liberated, in case he did not he should be still detained, " nor could this well be complained of as a hardship, because the deten- " tion would be voluntary."

495. On the question of making fines a means of reparation, as suggested in the Note, Sir J. Awdry says, " I am clear that the " Commissioners are right both in the holding that civil satisfaction " should not be lost because the crime is a great one, and that the " suffering inflicted by requiring that satisfaction should go in part of " the punishment." Mr. A. D. Campbell considers " the admirable " principle of involving compensation to the injured in the punishment " of crimes, especially of those against property, as quite invaluable." He " hails the proposed enactment as a long-needed and most welcome " blessing, particularly if the law of procedure is, as promised, so framed " that one trial should do the work of two." Mr. M. Lewin says: " Hitherto there has been neither vengeance nor compensation in the " law. The Code proposes to unite these principles—though the merit " of the invention does not belong to its framers; it is to be found in " some of the Regulations of the Local Government, and also in the " Mahomedan law. The principle obtained in the country before it " came under British rule, and its disregard, has been a fruitful source " of complaint against all its arrangements." " In a country such " as India, where the great majority of the people are poor, and unable " to sustain the ordinary expense incident to the maintenance of " their rights,—where cheap justice is the only justice—the principle " should be carried to its utmost limit, it should be prompt and complete " justice at the least possible cost to the injured party." Mr. Vaughan, Mr. Anderson, Mr. Casamajor, Mr. J. F. Thomas, and others, also approve of the principle, and consider the object highly desirable. Mr. F. N. Maltby, on the other hand, points out the danger of leading to false charges in order to transfer a true cause from the civil to the criminal file, and to charges actually false, a consideration which is referred to also by the Commissioners on the English Criminal Law.

496. But while Mr. Campbell and Mr. Casamajor approve of the principle of involving compensation to the injured in the punishment of crimes, they think it should not be carried into effect in the manner proposed. The following are the observations of Mr. Casamajor, in which Mr. Campbell expresses his concurrence: " *Fine* should be distinguish- " ed from *restitution*. The corrupt judge and the perjurer, in page 6, and " every other illegal gainer, should be made to disgorge the whole of " their illegal gains so far as they were within their power, as *restitution*, " and be fined besides. For the restitution, imprisonment should not be 7th Report, p. 94

" allowed as a substitute, the culprit should not be set free till he had " accounted satisfactorily for the whole of his illegal gains, and shewn " what portions of them were really and truly within his power, and " what portions irrecoverably and bonâ fide beyond his control, or the " possibility of recovery; for the fine, imprisonment should be allowed as " a substitute, because the fine is simply penal and so is the imprisonment " in lieu of it."

497. Mr Casamajor appears to mean actual restitution of property wrongfully acquired or as much of it as is recoverable, and nothing more. Mr. Campbell would seem to mean actual restitution as far as possible, and making good the value of what cannot be restored, for he says it is only when the Court is satisfied that the offender's " means of " repaying the value of the remainder (after restitution of what property " is forthcoming) are quite exhausted" that the period of imprisonment ought to be limited.

498. The term " restitution" implies that something has been wrongfully obtained which is to be restored, and this appears to be the meaning attached to it by both these gentlemen generally; but Mr. Campbell speaks also of " remuneration for damage committed" as comprehended under this head, and we presume that in such a case, as there is nothing to be restored, he would have the damage assessed in money to be levied on the effects of the offender and paid to the party injured. Mr. Campbell proposes that " in cases of restitution " where the money is due by the act of the culprit himself it should be " recoverable from him by distraint at whatever time means may " accrue."* " I see no reason," he says, " why the period for its recovery should be limited to 6 years only."

499. It seems to us that there is no substantial difference in effect between the imposition of a fine upon an offender and awarding a certain portion thereof, or the whole if need be, to the party whom he has injured, and the awarding of " restitution," including under that term reparation for damages as Mr. Campbell appears to intend, and the imposition of a fine, as separate acts. It appears to us that there would be inconvenience, in a case of theft, for example, in making an award of restitution absolutely, and that as a practical measure it would be necessary to provide that if the goods stolen cannot be restored the offender shall pay the value. It seems to be a simpler and more easy

* Colonel Sleeman suggests that " when a fine is imposed for compensation to another " the person fined should be required to pay the whole amount, or to produce an application " for his release within the period fixed, by the injured person, or his or her heirs "

arrangement to impose a fine, and to order a certain portion of it to be paid to the party who has suffered loss or damage, providing in cases of theft, &c. that if the goods stolen are restored wholly or in part, the restitution shall discharge, or shall be credited in part satisfaction of so much of the fine as is awarded by way of reparation. A rule to this effect should form a part of the Code of Procedure. In every case we apprehend the process of distraint will be allowed for the recovery of fines where there is tangible property. This is a mode of "levying "by process of law," such, we presume, as is meant in Clause 55. The Code of Procedure will of course give the necessary powers, and make such provisions as may be deemed proper regarding the reservation of tools, seed, &c. as suggested by Mr. Vaughan and Mr. A D. Campbell.

500. We think there is some force in the distinction between imprisonment in default of payment of a fine which is strictly penal, and of one which is partly penal and partly compensative, upon the ground of which Mr. Casamajor and Mr. Campbell would let so much of the fine as is penal be *satisfied* by the endurance of imprisonment for a certain time where there is no property presently available for the discharge of it, while they would make future acquisitions of property answerable for the purpose of "restitution," or for the payment of so much of the fine as is intended for reparation. But, with a view to this distinction, if it should be thought proper to establish it, there would be no necessity to separate the award of reparation from the fine, as under the provision intended by the Code, the portion of the fine awarded as compensation would be distinctly specified in the sentence. Some modifications of details would be requisite, and we should be rather inclined, in pursuance of Mr. Casamajor's suggestion, to make it a condition of the entire release of a person who has suffered imprisonment in default of payment of a fine that he should enter into proof that he had given up all his property without reserve, failing which, though liberated in person, the fine should still be leviable according to Clause 57.

501. It is to be observed that by an Act passed by the Government of India since the Penal Code was presented by the Indian Law Commissioners, Magistrates are empowered to levy fines imposed by them, by distress, and if no property is forthcoming to commit the offender to prison, there to be kept to hard labour for any term not exceeding 2 months where the fine does not exceed 50 Rupees, and for any term not exceeding 4 months where the fine does not exceed 100 Rupees, and for any term not exceeding 6 months in any other case. Act II of 1839

Bengal Regulation XIV 1797, Sec 3.
Madras Regulation VII 1802, Sec 29.
Bombay Regulation XIV 1827, Sec. 9.

502. When fines are imposed by superior Criminal Courts in the Presidencies of Bengal and Madras, by the present laws they are required "to fix a definite period of imprisonment to be held as equivalent to the "fine, at the expiration of which the persons convicted shall be discharged "although they should have omitted to pay the fine." The law is the same in the Bombay Presidency, except that the term of imprisonment is limited to 5 years.

503. The Regulations of Bengal and Madras above referred to, specially prohibit the imposition of fines by any Court of criminal jurisdiction save and except to the use of Government, and ordain that no pecuniary compensations, &c. shall be recoverable in any criminal prosecution. But with respect to Madras, Act XXX. of 1845 makes it competent to Session Judges "in adjudging a sentence of fine to award "such fine, or any part of such fine in compensation to the party who "may have been injured, in like manner as it is competent to Magistrates "to award fines under Clause 2, Section 39, Regulation IX. of 1816 of "the Madras Code." There is a similar provision for the Presidency of Bombay in Act IX. of 1838. The principle of compensating prosecutors out of fines levied by the Supreme Courts is sanctioned by the Statute 9, Geo. IV., Cap. 74, Section 52. And the Act of the Government of India No. XXXI. of 1839, Section 29, following 7 and 8, Geo. IV., Cap. 29, Sections 41 and 42, and Cap. 30, Section 24, authorizes Justices of the Peace on summary convictions to award a fine over and above the value of property injured, &c.

Note A, p 11, 12 and 13

504. The authors of the Code, after vindicating the punishments provided in it, proceed to explain why some others were omitted. They state particularly their reasons for omitting public exposure and flogging from their list of punishments. We are inclined on the whole, though not without hesitation, to agree with them, but there are many who are of a different opinion.

505. Sir J. Awdry says, "I greatly doubt the expediency of totally "abolishing the punishment of public exposure. It should be very "sparingly used—should be confined to crimes really scandalous, and to "which we wish to teach the people that we attach a particular "opprobrium. The more atrocious species of the *crimen falsi* have this "character. They have moreover this characteristic, that whilst exposure "is, as the Commissioners justly remark, the most unequal of all punish-"ments, the severity varies, if restricted to this class of crimes, in a "great measure with the circumstances of aggravation of individual guilt

"and public mischief." Mr. A. D. Campbell, Mr. Vaughan, Mr. A. W. Begbie, and others, think this kind of punishment should be retained for perjury and forgery, and crimes against nature.

506. A considerable majority of Officers of the Madras Presidency express strong objections to the abolition of flogging as a punishment. It is to be remembered that the law, which abolished corporal punishment in the Territories subject to the Presidency of Fort William, was not extended to Madras and Bombay. Regulation II. 1834.

507. The Commissioners thus conclude their observations on the subject:—"Being satisfied, therefore, that the punishment of flogging "can be proper only in a few cases, and not being satisfied that it is "necessary in any, we are unwilling to advise the Government to "retrace its steps, and to re-establish throughout the British Territories "a practice which, by a policy unquestionably humane, and by no means "proved to have been injudicious, has recently been abolished through "a large part of those Territories." Neither are we prepared to recommend to Government to recede from the position taken in 1834 on this subject. We believe that though corporal punishment is still legal in the Presidencies of Madras and Bombay, it is much more rarely resorted to than it used to be.

508. It is observed in Note A. that the moderate flogging of young offenders for some petty offences is not open, at least in any serious degree, to the objections stated against the general use of this mode of punishment. On the contrary, it is admitted that in countries where a bad system of prison discipline exists, the punishment of flogging has in such cases a great advantage over that of imprisonment, namely, that the young offender is not exposed even for a day to the contaminating influence of an ill-regulated gaol. It was upon this ground we believe that the Magistrates were authorized by Act III. of 1844, to punish offenders of tender age with stripes. At the same time, professedly as a temporary measure, until adequate improvement in prison discipline can be effected, the Magistrates were authorized to sentence to corporal punishment persons convicted of petty theft. By a later Act XVIII. of 1845, on the ground that offences committed by convicts sentenced to imprisonment for life should be punished with greater severity than such offences are punished with in other cases, such convicts are made liable to corporal punishments. This may be considered a measure of prison discipline. p. 13.

509. By Clause 59 it is declared that "where it is provided that "punishment shall be cumulative, that provision does not authorize the CUMULATIVE PUNISHMENT

"combining in any case of the punishments provided by more than "two penal provisions of this Code."

510. Sir J. Awdry commends "the expressly providing for cumu-
Supra para 124 "lative punishment" as "very good." Sir H. Seton as we have already remarked, questions the propriety of this arrangement which runs through the Code and is a distinguishing feature of it. Mr. Norton says, "I "conceive the doctrine of cumulative punishment to be unjust in "principle and calculated to perplex, as the illustration to Clause 60 "may serve to indicate. I conceive the plain law of one punishment "for one offence without breaking substantive offences into separate
Ibid "offences is the best law." We have before mentioned what we take to be the principal reason for the arrangement in question, namely, to provide discriminately for aggravations which the English law provides for indiscriminately, by allowing a much greater latitude in the punishments for the primary offences. It will be found we think that the arrangement does not consist, as Mr. Norton imagines, "in breaking "substantive offences into separate offences," but in prescribing appropriate punishments for the substantive offences, according to the definitions of them, without extrinsic aggravations, and providing that where an extrinsic aggravation does occur which amounts to an offence under any Clause of the Code, the penalty of that offence may be added to the penalty of the primary offence. For example the penalties for house trespass are laid down in Clause 426, and it is provided in Clause 427 that "if any person commits house trespass in order to the committing "of another offence and actually commits that other offence the punishment "shall be cumulative," that is, the offender shall be liable to the punishment of that other offence as well as to the punishment of house trespass. The punishment of either offence intended to be applied where there is no extrinsic aggravation, would be insufficient by itself; but the addition to be made in consequence of the extrinsic aggravation is not left to arbitrary discretion, the nature of the aggravation determines it, the Judge has to consider whether it amounts to an offence, and if it does, he will add the punishment of that offence. The Commis-
7th Report p 97 sioners on the English Criminal Law remark that "one of the principal "imperfections incident to the system of punishment adopted by the "law of England, is the want of regular gradations of punishment "corresponding with the aggravations incident to large classes of
p 99 "crimes." "At present," they say, "such aggravations, though not "defined, do in fact enhance the punishment, yet the malefactor is not "only without notice of the intention to prove the circumstances which "operate in aggravation, but is without warning that they will be "regarded as aggravations." Under the arrangement adopted in the

Code, the offender will have the most precise information both of the primary charge, and of the secondary charge alleged by way of aggravation, which if proved will subject him to a certain additional punishment. We repeat that we cannot but think that the method of the Code as it limits discretion is conducive to exactness in the meting of punishment, while it will tend to the advantage of the offender by apprizing him specifically of the aggravation he has to answer for.

511. We have now to notice the provisions for the commutation of sentences—" It will be seen," say the Commissioners, " that we have given " to the Government a power of commuting sentences in certain cases " without the consent of the offender. Some of the rules which we " have laid down on this subject will be universally allowed to be proper. " It is evidently fit that the Government should be empowered to " commute the sentence of death for any other punishment provided by " the Code. It seems to us also very desirable that the Government " should have the power of commuting perpetual transportation for " perpetual imprisonment. Many circumstances, of which the executive " authorities ought to be accurately informed, but which must often be " unknown to the ablest Judge, may, at particular times, render it highly " inconvenient to carry a sentence of transportation into effect. The " state of those remote Provinces of the Empire, in which convict settle- " ments are established, and the way in which the interests of those " Provinces may be affected by any addition to the convict population, " are matters which lie altogether out of the cognizance of the tribunals " by which those sentences are passed, and which the Government only " is competent to decide. Note A. p 3

512. Mr. Norton, we believe, stands alone in objecting to these arrangements. He says, " the arbitrary authority (Clause 42) to change " transportation for life into imprisonment for life, which may be possi- " bly rigorous, and which may be far the severer punishment is, in my " opinion, uncalled for, and may be unjust." Considering that imprisonment for life is made generally the alternative for transportation for life, and adverting to the circumstances referred to in the Note, which may sometimes render it inexpedient to carry a sentence of transportation into effect, we are not surprised that there is none who agrees with Mr. Norton in pronouncing the provision for this commutation " uncalled for," or in surmising that it " may be unjust." Sir J. Awdry says, " the " power of the Executive Government to commute transportation, as " distinct from the general prerogative of mercy, is, I think, grounded " on sufficient reason." This power of commutation is practically exercised in England under Section 10, 5 Geo. IV., Cap. 84, by which it

is lawful for the Secretary of State to order convicts, under sentence of transportation, to be confined in any place appointed for the purpose by Her Majesty, in England, until, it may be, they "shall become entitled "to their liberty."

513. By Clause 42, a sentence of transportation may be commuted also for banishment from the Territories of the East India Company. Mr. Norton says this is a mode of punishment, which "appears almost "impracticable." "How it is to be enforced is not provided." Mr. Norton must have overlooked Clause 205, which provides that a person returning from banishment "shall be punished with transportation for a "term which may extend to seven years, to which banishment for life "shall always be added."

514. The authors of the Code anticipated objections to Clauses 43
Note A. p 4. and 44. In the latter of these they provide that "whenever a person "not both of Asiatic birth and of Asiatic blood commits an offence so "serious that he is sentenced to two years of simple imprisonment, or to "one year of rigorous imprisonment, it shall be competent to the "Government to commute that punishment for banishment from the "Territories of the East India Company." In the former they provide that if a person of the same description commits an offence so heinous as to be visited with a sentence of imprisonment for seven years or more, the Government shall have "the power of substituting an equal term of "transportation for that term of imprisonment, and of excluding the "offender, after the expiration of the term of transportation, from the "Territories of the East India Company." "We are satisfied," they say, "that both humanity and policy require that those provisions, or others "very similar to them, should be adopted." Their reasons for this
p 3. opinion they state as follows:—"the physical difference, which exists "between the European and the Native of India, renders it impossible "to subject them to the same system of prison-discipline. It is most "desirable, indeed, that in the treatment of offenders convicted of the "same crime and sentenced to the same punishment there should be no "apparent inequality. But it is still more desirable, that there should "be no real inequality, and there must be real inequality unless there be "apparent inequality. It would be cruel to subject an European for a "long period to a severe prison-discipline, in a country in which "existence is almost constant misery to an European who has not many "indulgences at his command. If not cruel it would be impolitic. It "is unnecessary to point out to his Lordship in Council how desirable it "is that our national character should stand high in the estimation of the "inhabitants of India, and how much that character would be lowered

" by the frequent exhibition of Englishmen of the worst description, placed " in the most degrading situations, stigmatized by the Courts of Justice " and engaged in the ignominious labor of a Gaol." The reasons they give for not suffering Europeans who have been convicted of serious crimes and have suffered punishment, afterwards to reside in this country, are of a similar character to those last stated. It would be impolitic, for their degradation and vicious habits tend to reflect disgrace on the Government. Parliament, when it threw open a large part of India to British subjects, directed the local legislature to provide against dangers which might be expected from the influx of men of lawless habits and blasted character. No regulation can promote more effectually, or in a more unexceptionable manner, the end which Parliament had in view than that now proposed.

515. Sir J. Awdry says, " the observations (of the Commissioners) " on transportation appear just as regards this country, but they have " properly qualified their application to Europeans" (in allowing the term of transportation to be short of life.) " The banishment from " India of foreign criminals seems to me most properly made a part of " the Code." On the other hand Mr. Cochrane and Mr. Norton make objections to those Clauses. Mr. Cochrane indeed protests against them as containing " terrible enactments," " in his view wholly unjustifiable." He objects in principle to the interference of Government for the purpose of superadding punishments to those affixed by Courts of Justice, which he thinks is within the scope of these provisions, as both impolitic and unjust. Notwithstanding the explanations offered in the Note, he cannot see that transportation involving imprisonment with labour in some British Colony situated in a temperate climate is to a European a favorable commutation for imprisonment with labour in an Indian Gaol. He says, " The observations of the Commissioners on the subject of the " imprisonment of Europeans, would apply rather to the regulating such " imprisonment than furnish any reason for vesting the Government with " a power so terrible as that which the 43d and 44th Sections seek to " confer." " I know of no such physical difference, which should in " any degree entitle such provisions to be passed." He contends that the provisions in these Clauses allowing banishment for life do in effect produce inequality of punishment between Europeans and Natives, that the so-called commutation involves really additional punishment.

516. Mr. Norton says, " I think both Clause 43 and Clause 44, " under which after part of a sentence of imprisonment may have been " endured by a person not of Asiatic birth or blood, that imprisonment

" may be arbitrarily changed to transportation in some cases, and to " banishment for *life* in others; and, that, although possibly but a " few months of imprisonment may have to be undergone—authorize " the *power* to confound and overthrow all justice, equality, and " humanity, in sentences." Upon this we must remark that instead of a *few months*, there must remain under Clause 44 two-thirds of the whole term of imprisonment, which ranges from one year, when the law requires that it shall be of the description termed " rigorous," and two years when the description is not specified, to any period short of seven years; while under Clause 43, the remaining term must be at least five years.

517. Mr. Vaughan conceives that " punishment may be provided " for Europeans under the rules for rigorous imprisonment, and labour " may be enforced against them, with no more danger to health than it " is now voluntarily performed by Soldiers, Artificers, &c." " Small " European Jails may be established at healthy European Stations, and " European attendants may be selected from steady men not fit for " active service, to whom it would afford an extra provision."

518. Mr. Hudleston and others offer objections, which we need not particularly notice; Mr. A. D. Campbell thus refers to them—" To " Clauses 43 and 44, not only Mr. Hudleston, but many other Officers in " the interior, object, I think, on insufficient ground. For under the " explanation given, banishment from the Company's Territories, even for " life, is plainly intended in mitigation, not in enhancement of the " sentence specified, when passed on Europeans, and transportation as " regards them is not to be perpetual. But though the policy and " humanity of these enactments seem to be vindicated, I doubt their " impartiality; and, on this point, would direct attention to the strong " opinion given by a Native, V. Sreenavasiah, Naib Serishtadar in " Chingleput—who, with reference to the desire of the Law Commission, " ' to save Englishmen of the worst description from being placed in " ' degrading situations, and engaged in the ignominious labour of a Gaol " ' equally with the Natives of India' compares such exemption with the " indulgence of the Hindoo Law in favor of Bramins, ' ridiculed by the " ' European nations,' and concludes that ' any distinction made in the " ' punishment of Englishmen and Natives' will, instead of upholding, " lower, the British character in the eyes of the public."

519. On the point last adverted to by Mr. Campbell, Mr. Vaughan says, " As for exposure of the European character, one would think that " the writers had never seen those which, unhappily are too frequent

" wherever an European Corps appears. The Natives have not such a " high opinion of red and white faces, as to suppose all who possess them " to be immaculate; and I should think it well to let them see that " justice is administered equally to all."

520. These Clauses, as stated in the Note, are intended primarily to admit of the Government relieving *European* offenders from a mode of punishment, which in general, it is conceived would, from the influence of the climate, be a more severe infliction upon them than upon Natives. But the expression used to designate the class of persons to whom they are to " apply is not both of Asiatic birth and of Asiatic blood." Referring to Clause 32 it will be found, that " the words ' a person of Asiatic blood,' de- " note a person whose father, or mother, or grandfather, or grandmother, " was of Asiatic birth, and as far as can be discovered of pure Asiatic " extraction." The expression, no doubt, was widened as above to admit of persons natives of temperate climates out of Europe being put on the same footing as Europeans in this respect.

521. Mr. Norton says, " I do not understand the difference meant " between persons of Asiatic *birth* and of Asiatic *blood* (*both* of which " qualities are to combine to bring parties under Clause 43) if a person " born of an Asiatic father or mother *is* of Asiatic blood, Clause 32." Though several other persons have commented on the definition in Clauses 43 and 44, of the parties affected thereby, none but Mr. Norton has failed to perceive that by a person of " Asiatic birth" in contradistinction from a person of " Asiatic blood," is meant one who was born in Asia.

522. Mr. Vaughan objects to the definition as rendering persons liable to be transported, who, though they could not be proved to be of Asiatic blood strictly according to Clause 32, are presumably of Asiatic extraction. How " hardly would these Clauses operate," he says, " against any with even a tinge of Asiatic blood, which ought to be " sufficient to give them a claim to residence till *sentence* of transportation " is passed by a *Court*, and even in the case of an European in regard to " such offences as are intended in Clause 44, can there be any necessity " to banish him from the Territories of the Company, to tear him " away from landed property and a family partly of Asiatic blood." Mr. Greenhill puts the case of the son of Indian parents born at Malta or Constantinople, who, though he may have been all his life resident in India, not being of Asiatic *birth*, would he apprehends be liable to transportation and banishment, at the pleasure of Government, under Clauses 43 and 44 respectively.

523. Mr G. W Bacon objects to these Clauses because by the definition "a child of an Englishman born in wedlock is deprived of his "father's rights, and vested with those of his maternal grandmother, if "she be a native of any part of Asia;" and because a person "whose "grandmother was a native of India is (erroneously as he conceives) "presumed to be so physically different from a pure European as to feel "little annoyance from confinement for seven years and upwards in the "Jails and under the climate of this country."

524. We must say that Mr. Bacon's objection appears to us well founded. For clearly a person who was merely born in Asia, but who was brought up from infancy and educated in England, whose mother was of English birth, and whose father and paternal and maternal grandfathers were both of English birth and English blood, could not be relieved by Government under these Clauses, if his maternal grandmother were of Asiatic birth, that is, born somewhere in Asia, it may be on the confines of Europe, and were, "as far as could be "discovered, of pure Asiatic extraction." Again, a Native of Siberia, being both of Asiatic birth and Asiatic blood according to the definition, could not be relieved under these Clauses, though confinement in an Indian Gaol would, no doubt, cause as much suffering to him as to an European.

525. These appear to us to be very strong objections to the definition in question, and to the terms employed, subject to that definition, in Clauses 43 and 44. But we are unable to suggest an amendment which would remove the difficulty, and be otherwise unexceptionable. We do not attach a great degree of importance to any of the considerations which suggested the introduction of the Clause we are examining into the Code, except the first mentioned, the consideration that a long imprisonment in an Indian Gaol is a much more severe punishment to an European to whose constitution the climate is unfavorable, than to a native. For the end in view on this consideration, namely, the relief of parties who from their constitution and habits are unfitted to endure such punishment, it appears to us that the provision in Clause 45 empowering the Government to commute the punishment to which an offender has been sentenced, *with his own consent*, for any other punishment provided by the Code, except death, may be sufficient. Under this general provision the Government would be empowered to give the relief of transportation to a more temperate region to all to whom the commutation would be welcome.

526. We have lastly to consider the provision contained in Clause 61, "intended to prevent an offender whose guilt is fully established

Note A, p 14

" from eluding punishment on the ground that the evidence does not " enable the tribunals to pronounce with certainty under what penal " provision his case falls." For example, in a case of murder, when it may be certain that either A or B murdered Z, and that whichever was the murderer was aided by the other in the commission of the murder, it is meant that the Court shall record its finding according to the literal truth, namely, that A has either murdered Z, or aided B to murder Z, and that B has either murdered Z or has aided A to murder Z, and upon this finding shall sentence A and B respectively to some punishment common to both offences, that is, a punishment which might be inflicted if the parties were convicted positively either of murder, or of the previous abetment of murder by aid. In this instance the punishment happens to be the same. Again " it will often be certain that there has been a frau- " dulent appropriation of property; and the only doubt will be whether " this fraudulent appropriation was a theft or a criminal breach of " trust." In such a case it is intended that the finding shall be in this form—that the accused has committed either theft or criminal breach of trust, and that sentence shall pass thereupon awarding some punishment which may be inflicted for either theft or criminal breach of trust. The difference between the punishments for these offences is merely that for theft the imprisonment *must be* rigorous, while for criminal breach of trust it may be rigorous or simple at discretion. We cannot but agree with the authors of the Code that in the former case " to suffer both " offenders to go unpunished though it is certain that both are guilty of " capital crimes merely because it is doubtful under what Clause each " of them is punishable, would be most unreasonable," and equally absurd in the latter case to allow the offender clearly guilty of a fraudulent misappropriation to escape unpunished because of a doubt as to the precise designation of the offence, as theft or criminal breach of trust. The offender ought not to be subjected to a penalty to which he would not be liable if the conviction were positive for the minor offence, which is ensured by the rule that the punishment is to be one common to both offences; this being provided for, justice as it appears to us will be satisfied by the provision in Clause 61.

527. Sir J. Awdry observes that " the principle of punishment " on conviction in the alternative is just. It does directly what the Law " of England professes not to do, but does indirectly, and subject to " defeat by technical accidents, as where the crime is laid differently in " different Courts." Mr. Norton says, " The last Clause 61, appears to " me in point of reason the most objectionable of any. It provides for " the punishment of parties where either the law or the fact is so doubtful " that the Judge cannot say what offence has been committed." But it

is to be remembered that according to the supposition the main facts which constitute the *corpus delicti* are proved, and that the doubt relates to some incidental point which is of a quality important only as determining whether the offence falls technically under one designation or another, as for example in the case already put, where a man is charged with theft, and the fraudulent appropriation is proved, but a doubt is raised by the evidence whether the party had not the property in trust. Without determining this point the Court convicts him in the alternative, and sentences him to a punishment equally warrantable whether the offence technically were theft or breach of trust. We do not see that the party is any way wronged by this proceeding, while public justice is vindicated. Mr. Hudleston says, "A Judge should be bound to make up his mind as "to the particular crime for which he holds the prisoner guilty." "The "accused is entitled to know precisely of what he is accused in order to "defend himself," and "a decision of guilty or not guilty of a specific act "must be passed." It is proper that the accused should know precisely of what fact he is accused, and it is proper that there should be a decision of guilty or not guilty of a specific act, but all this is compatible with Clause 61. The *corpus delicti* may be set forth and the accused may be pronounced guilty or not guilty of it, although the offence be not positively designated by a specific term. It does not appear to us to be essential that the Judge should make up his mind to convict positively of theft or breach of trust, or else to acquit, if he finds the *corpus delicti* to be proved, and is satisfied that it is theft if it is not breach of trust, and breach of trust if it is not theft, certainly either the one or the other. Mr. A. D. Campbell says, "in all cases of doubt, giving the prisoner the "benefit of it, I would convict of the minor crime alone." This would be doing exactly what the authors of the Code wish to avoid, making the Court affirm what is not literally true; it is surely better to adhere to the literal truth by finding in the alternative, and passing a sentence which would be appropriate if the conviction were for the minor offence.

528. Mr. Bacon suggests a difficulty with reference to the case stated in the illustration (*a*) to Clause 98. He supposes the Court to find it doubtful what "A considered likely" to be "done by B," and to be therefore "at a loss whether to convict A of abetting murder or only "abetting robbery." "As there is no punishment common to both "crimes," he asks, "what sentence is to be passed on A? B being "convicted of robbery and murder." The question is easily answered. Under the circumstances of the case as stated in the illustration, it is clear that A was guilty of abetting robbery, possibly he was guilty of abetting murder also, but that not being clear, the Court would of course convict him of the former offence only, and sentence him accordingly.

CONCLUSION.

529. Having now accomplished a detailed review of the whole Penal Code, and of the criticisms, objections, and suggestions, contained in the Reports upon it, which appeared to us most proper to be presented to the notice of Government, or which seemed to call for remark from us in the way of answer or explanation, in the prosecution of which review we have fulfilled the instruction of Government to " direct our attention " to the act of crimes and punishments contained in the seventh Report " of the Commissioners on the Criminal Law of England with a view to " comparison, and the detection of any omissions, or other imperfections " that may exist in the Code," and having distinctly expressed our sentiments upon the definitions and penal provisions of the Code as they have severally passed in order under our examination, we have only in conclusion to say, in general, that the opinion we delivered in our former Report, with respect to the portion to which we had then given our more particular attention, is that which we would now offer as our mature judgment on the whole work. Para. 649.

530. As to the manner in which we have performed our part, we cannot but entertain a fear that in spite of the pains and care we have taken to present fully and fairly for the consideration of Government the criticisms upon the Code the most deserving of attention, we may have omitted observations well worthy of notice, and creditable to the sagacity and judgment of those who offered them, and may have imperfectly stated the views of some whose remarks we have adverted to. Comprising as the Code does 488 Clauses, upon almost all of which we have had occasion to comment, we cannot flatter ourselves that we have entirely escaped from error in our own interpretations of it, nor in the constructions we have put upon the criticisms of others. Some inaccuracies and oversights, we doubt not, may be detected in the comments we have made both upon the Code and upon the remarks of its critics. We hope however that none will be found of any great importance; and for any errors or omissions that may be discovered, our apology must be the extensiveness of the subject we had to treat, and the voluminousness of the Reports containing the criticisms we had to examine and digest.

531. Should the Government on the whole concur in the judgment we have expressed as the result of a very searching examination of the Penal Code in all its parts, and in our general estimate of it as a body of law, in a practical view, we would beg very earnestly to recommend the enactment of it for all the Territories subject to the Government of

the East India Company, except what is comprised within the local limits of the Criminal Jurisdiction of the Courts established by Her Majesty's Charter *

532. The strange anomaly in the jurisprudential condition of British India, which consists in the three capital cities having systems of law different from those of the countries of which they are the capitals, cannot, we imagine, be permitted to exist much longer. The year 1854, will probably put an end to it, if it should be permitted to endure till that epoch.

533. But the question arises, should the assimilation be brought about by extending the law of the Presidencies over India, or by extending the law of India over the Presidencies, or by an amalgamation of the two?

534. In our opinion, if the penal law of India consists of this Code, and the civil law of India consists of portions of the Hindoo and Mahomedan law, and that system of English law, which our commission have recommended as the *lex loci*, which may be described as the English system of rules for accomplishing the ends of universal Jurisprudence, there can be no doubt that these laws should be extended over the Presidencies in preference to either of the other schemes.

535 But at the present moment we do not recommend the enactment of this Code for the Presidencies, unless the Judges of any of the Supreme Courts should express a wish to that effect.

536 We do not advise the general repeal of the penal laws now existing in the Territories for which we have recommended the enactment of the Code

537 We think it will be more expedient to provide only that no man shall be tried or punished (except by a Court Martial) for any facts which constitute any offence defined in the Code, otherwise than according to its provisions.

* We have already recommended in our Report, dated the 4th November 1843, that British Subjects should be made subject to the jurisdiction of the Company's Courts But we did not think, and do not now think, it desirable that such persons should be made subject to the existing penal law of the Mofussil If however, the Penal Code is adopted there can be no reason for excepting British Subjects from its operation We are now preparing a scheme of pleading and procedure with forms of indictment adapted to the provisions of the Code, in conformity with the instructions conveyed to us in Mr Secretary Bushby's letter, dated the 20th March last, and in submitting it to Government, we shall take the opportunity to suggest the mode of proceeding which appears to us the most expedient for the trial of British Subjects by the Company's Courts, especially in capital cases

538. It is possible that a few actions which are punishable by some existing law and which the Legislature would not desire to exempt, may have been omitted from the Code. And, in addition to this consideration, it appears to us that actions which have been made penal on special temporary grounds ought not to be included in a general Penal Code intended to take its place amongst the permanent institutions of the country.

539. The law, for example, which prevents the Natives of India, of the labouring classes, from exercising the ordinary right of freemen by contracting to carry their labour to any market which may seem to them advantageous, though it may be a useful and necessary law while a large part of the population is in a state of ignorance which unfits it for the discreet exercise of such a right, is yet obviously a law marked out for abolition when advancing civilization shall have rendered it unnecessary and consequently vexatious, and such a law should not, we think, be suffered to intrude into a Code intended to endure, we will not say for ever, but until more ample experience and the reflections of Jurists and Statesmen may bring to light new principles more effectual for the prevention of crime.

540. Any existing penal law, not virtually superseded by the Code, which the Legislature does not approve of, ought, in our view, to be specifically repealed.

541. If the Legislature adopts our recommendation to enact the Code, we beg to point out the expediency of immediately making it a subject of study in the Government Colleges, and of requesting the Council of Education to introduce questions framed upon its provisions and upon the Notes appended to it, into the examinations for carrying into effect Lord Hardinge's Resolution of 10th October 1844.

542. It is not the least of the many advantages of a Penal Code of which the principles are purely rational, and of course always consistent with each other, that a student may become thoroughly master of it without the aid of any extrinsic learning.

543. The English Criminal Law cannot be fully understood without a considerable share of historical and antiquarian knowledge. Knowledge of that kind is no doubt an elegant and even a useful accomplishment. But it is no more necessary to the comprehension of a penal law founded solely on principles of Morality and Jurisprudence, than an acquaintance with the biography of Euclid is necessary to the comprehension of the problems and theorems of Geometry.

544. The study of the Code will require no such foreign illustration, and will on this account and also on account of its systematic form, be a task incomparably easier than the study of the criminal law administered by the Supreme Court. And the consequence will be, that in a few years the penal law of India will be familiarly known to a great number of young men of the middle classes, who, besides furnishing recruits to the judicial service, will constitute a public prepared to criticise the proceedings of the Criminal Courts in a fair and enlightened spirit.

C. H. CAMERON
D ELIOTT

INDIAN LAW COMMISSION,
The 24th June, 1847

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